

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

VOL. I

INDEX

	Original	Print
Record from Supreme Court of the State of New York,		
Appellate Division, Second Department	1	1
Statement under Rule 234	1	1
Notice of appeal to Appellate Division of the Supreme		
Court of New York (County of Nassau)	3	2
Summons (County of New York)	4	2
Complaint (County of New York)	5	3
Answer (County of New York)	8	5
Bill of particulars (County of Nassau)	13	8
Order changing venue (County of New York, Special		
Term I)	20	13
Judgment appealed from (County of Nassau, Special		
Term II)	23	15
Case and exceptions (County of Nassau, Special		
Term II)	25	16
Appearances	25	16
Opening statement on behalf of defendant by		
Mr. Grimes	26	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 23, 1953.

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

	Original	Print
Opening statement on behalf of plaintiff by Mr. Rollins	30	19
Colloquy between court and counsel	32	20
Testimony of Arthur R. Seaton, Sr.	54	38
Motion to amend complaint and ruling thereon	114	85
Testimony of Eugene Schoen	117	87
John R. Evans	130	98
Motion to dismiss the complaint and ruling thereon	150	113
Testimony of Harold Carlson	152	114
Augustus B. Weller	178	135
William H. Abel	201	153
John J. Keuthen	219	169
Colloquy between court and counsel	221	170
Testimony of Matthew Chappell	223	172
Hilda Barnes	299	226
Willard R. Simmons	314	238
Hope Butt	349	266
Colloquy between court and counsel	357	272
Testimony of Walter Ohnmacht	360	274
Francis Ludemann	366	279
Motion to dismiss complaint and ruling thereon	455	346
Testimony of Richard Brumbach	456	346

VOL. II

Matthew N. Chappell (Recalled) ..	514	388
Willard K. Simmons (Recalled) ..	523	395
William J. Boyle	533	402
Charles W. Green	540	407
Colloquy	550	414
Testimony of Arthur T. Roth	554	417
Plaintiff's motion to strike out evidence and for judgment (County of Nassau)	673	503
Plaintiff's Exhibits	711	529
1, 2, & 3—Advertisement appearing in Long Island Daily Press, March 10 and March 24, 1947 and in Nassau Daily Review-Star, March 17, 1947	711	529
4, 5, 6—Advertisements appearing in Newsday, May 8, June 17, 1948 and January 4, 1949	715	530
7, 8, 12—Advertisement and Circular; Advertisement appearing in Newsday and in Nassau Daily Review-Star, March 29, 1950	717	530
9A—Envelope containing various forms	718	531
9B—Envelope containing forms for opening of a Savings Account	719	532

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Plaintiff's Exhibits—Continued

	Original	Print
9C—Envelope containing forms for opening of a Children's Savings Account	720	533
9D—Deposit Slip for Savings Account	721	534
9E—Card for opening Savings Account	722	535
9F—Card for opening Children's Savings Ac- count	723	536
9G—Card for opening Special Checking Ac- count	724	536
9H—Deposit Slip for Checking Account	725	538
9I—Envelope containing forms for opening a Special Checking Account	726	539
9J—Business Reply Card	727	540
9K—Draft	728	541
10A—Business reply envelope	729	542
10B—Letter signed by Arthur T. Roth	731	542
10C—Application Slip	732	543
11—1948 Annual Report of the Defendant- Respondent Bank	733	544
13A—Deposit Slip for Savings Account	735	578a
13B—Withdrawal slip for Savings Account	736	579
14—"Dime-Saver" issued by Defendant-Re- spondent Bank (omitted in printing, pur- suant to stipulation)	736	
15 A, B, C—Letters dated April 16, 1947; April 3, 1947; and March 25, 1947 from Deputy Superintendent of Banks to Arthur T. Roth	736	579
16—Identification Card of Bank Examiner, Arthur R. Seaton	738	581
17—Examiner's Comments, dated April 10, 1950	739	581
18-28 (inclusive)—Exterior and interior photographs of Bank	741	585
29—Photographs of Deposit Slip for Check- ing Account and Savings Account (copy) (omitted in printing)	763	
30 & 31—Photographs of interior of bank	765	598
32—Photographs of withdrawal slip and blot- ter	769	598
33—Certificate of State Superintendent of Banks	770	599
34—Certificate of Comptroller of the Cur- rency, No. 12997	772	600
35—Certificates authorizing change of name and change of corporate title	773	601
36—Financial statement	775	602

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Defendant's Exhibits:

	Original	Print
A—Preliminary Architect's Drawing of bank building and proposed new wing	777	602
B—Architect's Drawing of westerly addition to bank (omitted in printing, pursuant to stipulation)	778	603
C—Brochure distributed by Defendant, showing sketches of various portions of the bank and facilities offered to the public	779	605
D-R—(Omitted in printing, pursuant to stipulation)	780	
D-G—Forms of Questionnaires used in connection with poll survey	780	621
H—Report of Bureau of Census, U. S. Department of Commerce	781	621
I—Aerial Survey of Glen Cove	781	622
J—Aerial Survey of Levittown	781	622
K—Map showing location of clusters of Nassau County	781	622
L—Street and Road Map of Nassau County	782	622
M—Tippett's Random Sample Numbers	782	622
N—For identification—Tippett's Table of Random Sampling Numbers	782	622
O—Array Sheets—Urban Population	782	622
P—List of Clusters for Glen Cove	783	623
Q—Pre-listing Sheets for Cluster No. 15	783	623
R—Array Sheet for Unincorporated Areas	783	623
S—Forms used by Hofstra College in survey covering services utilized by financial institutions	785	624
T-BB—(Omitted in printing, pursuant to stipulation)	786	
T—928 Questionnaires	786	625
U—22 Sets of Pre-listing Sheets	786	625
V—Computations showing Federal and State Income Taxes	786	625
W—For Identification—Regulation Q of the Federal Reserve Bank of New York	786	625
X—For Identification—Regulation D of the Board of Governors of the Federal Reserve System	787	625

INDEX

v

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Defendant's Exhibits—Continued	Original	Print
Y—U. S. Savings Bonds Poster	787	625
Z—Calculation Sheets of Professor Brum- bach	787	626
AA—The definitions used in connection with Hofstra Survey	787	626
BB—Classified Response Lists	787	626
CC—Hofstra College Survey Report (Pages 13-34)	788	626
DD—Additional Computations	809	639
EE—Typical Bank Advertisements	813	642
FF-II—(Omitted in printing, pursuant to stipulation)	814	643
FF—For Identification—Annual Report of Defendant for year 1946	814	643
GG—For Identification—Article appear- ing in July, 1947 issue of Bank- ing Magazine	814	643
IIIH—For identification—Article appear- ing in Magazine Digest	814	643
II—For Identification—Article appear- ing in February, 1945 issue of Readers Digest	814	643
JJ—Photograph of Elmont Office of De- fendant	815	644
KK—Photograph of Levittown Branch of Defendant Bank	817	646
LL—Photograph of Rockville Centre Branch of Defendant Bank	819	648
MM—Table Showing Increase in Deposits of Defendant Bank	820	649
NN—Stipulation, dated January 15, 1951	822	649
OO—For Identification—Opinion of Com- ptroller of the Currency, dated July 10, 1939 (omitted in printing, pursuant to stipulation)	825	652
PP—Form 2129-1 of the Treasury Depart- ment Office of Comptroller of the Currency	827	652
QQ-SS—(Omitted in printing, pursuant to stipulation)	828	653
QQ—Savings Bonds Poster	828	653
RR—Form of Payroll Savings Purchase Order for U. S. Savings Bonds	828	653
SS—Literature regarding U. S. Savings Bonds	828	653

Record from Supreme Court of the State of New York, Appellate Division, Second Department—Continued		
Case and exceptions (County of Nassau, Special Term II)—Continued		
Defendant's Exhibits—Continued	Original	Print
TT & UU—Letters dated March 20, 1947 and June 5, 1947 from President to Deputy Superintendent of Banks	828	653
Opinion, Cuff, J. (Nassau County)	830	654
Stipulation as to plaintiff's exhibits	856	672
Stipulation as to defendant's exhibits	857	673
Stipulation settling case	858	674
Order settling case	858	674
Order filing record in appellate division	859	674
Notice of appeal to Court of Appeals (County of Nassau)	863	675
Order of reversal (Appellate Division, Second Judicial Department, Borough of Brooklyn)	865	676
Judgment of reversal (County of Nassau)	868	677
Opinion of the Appellate Division, Second Depart- ment	871	679
Dissenting opinion, Nolan, J.	876	682
Clerk's certificate (omitted in printing)	877	
Proceedings in Court of Appeals of the State of New York	879	683
Order granting motion for leave to file a brief amicus curiae	879	683
Opinion, Desmond, J.	881	684
Dissenting opinion, Fuld, J.	888	690
Remittitur	892	692
Judgment of affirmance by Supreme Court on Remittitur from Court of Appeals	896	693
Affidavit	899	695
Petition for appeal	903	697
Order allowing appeal	904	697
Assignment of errors and prayer for relief	905	698
Citation (omitted in printing)	908	
Bond (omitted in printing)	909	
Statement required by Paragraph 2, Rule 12 of the rules of the Supreme Court (omitted in printing)	911	
Statement of points to be relied upon and designation of parts of record to be printed	914	700
Order noting probable jurisdiction	918	701

[fol. 1]

**IN SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION—SECOND DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Appellant,
against

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant-Respondent

STATEMENT UNDER RULE 234

This is an appeal by the People of the State of New York from a judgment rendered in the Supreme Court, Nassau County, which dismissed, after trial, the complaint in an action to enjoin the defendant bank from advertising, or soliciting or receiving deposits, as a savings bank, and from using the term "saving" or "savings" or their equivalent in the defendant's banking, financial business and dealings with the public.

The action, laid in New York County, was commenced by the service of a summons and complaint on May 12, 1950.

Issue was joined by defendant's service of an answer on June 20, 1950.

By order dated July 14, 1950, the action was removed to Nassau County.

[fol. 2] Trial was held before Mr. Justice Cuff, in Supreme Court, Nassau County, on January 23, 24, 25, 29, 30, 31, and February 1 and 2, 1951.

The judgment appealed from was rendered on June 7, 1951, and was entered on June 8, 1951.

Notice of appeal was served on June 22, 1951, and filed on June 25, 1951.

Plaintiff appeared by Nathaniel L. Goldstein, Attorney General of the State of New York. Defendant appeared by Alley, Cole, Grimes and Friedman, Esqs. There has been no change of parties or attorneys.

[fol. 3] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU

[Title omitted]

NOTICE OF APPEAL—June 21, 1951

SIRS:

Please take notice, that the above named plaintiffs, The People of the State of New York, hereby appeal to the Supreme Court of the State of New York, Appellate Division, Second Department, from the final judgment made by Mr. Justice Thomas J. Cuff, in the above entitled action dated the 7th day of June, 1951 and entered in the office of the Clerk of the County of Nassau on the 8th day of June, 1951, which dismissed the plaintiffs' complaint in the above entitled action upon the merits after trial and awarded to the defendant the costs and disbursements of said action as taxed, amounting to the sum of \$96.30, and from each and every part thereof.

Dated: New York City, New York, June 21, 1951.

Yours, etc., Nathaniel L. Goldstein, Attorney General
of the State of New York, Attorney for Plaintiffs,
Office and P. O. Address, 80 Centre Street, New
York 13, New York.

To Alley, Cole, Grimes and Friedman, Esqs., Attorneys
for Defendant, 30 Broad Street, New York City. Charles
E. Ransom, Esq., Clerk of Nassau County.

[fol. 4] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

Plaintiffs Designate New York County as the Place of Trial

[Title omitted]

SUMMONS—May 12, 1950

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice

of appearance, on the Plaintiffs' Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated: New York, New York, May 12, 1950.

Nathaniel L. Goldstein, Attorney General of the
State of New York, Attorney for Plaintiffs.

[fol. 5] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

COMPLAINT

Plaintiffs, by Nathaniel L. Goldstein, Attorney General, complain of the defendant above named, and allege upon information and belief:

First: That at and during all the times hereinafter mentioned, the defendant, The Franklin National Bank of Franklin Square, formerly known as "The Franklin Square National Bank", was and still is a national banking association organized and existing as a corporate entity under the provisions of the National Banking Act (12 U. S. C. A., Section 21, et seq.) and authorized by Charter No. 12997 and the certificate dated October 13, 1926, issued by the Comptroller of the Currency to transact and transacting the business of banking in the Village of Franklin Square in the County of Nassau and State of New York, as provided in Section fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

Second: That under the provisions of Section 258, subdivision 1, of the Banking Law of the State of New York, it is prohibited for any bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan [fol. 6] association to make use of the word "saving" or "savings" or their equivalent in its banking or financial business; and it is further prohibited by the provisions thereof for any individual or corporation other than a savings bank in any way to solicit or receive deposits as a savings bank.

Third: That the defendant was not, at any of the times herein mentioned, lawfully authorized or licensed to transact business as a savings bank in the State of New York or to hold itself out to the public as such.

Fourth: That from in and about the year 1947, to and including the date of the commencement of this action, the defendant has continued to use the term "saving" or "savings" in its banking, financial business and dealings with the public in the State of New York.

Fifth: That from in or about the year 1947, to and including the date of the commencement of this action, the defendant has solicited savings accounts for its bank conducted by it in the Village of Franklin Square in the County of Nassau as aforesaid by printed and exposed signs, printed circulars, stationery and varied and sundry advertising media, inclusive of newspapers in and on which the defendant publicly advertised and circulated the word "saving" or "savings."

Sixth: That the use of such words "saving" or "savings" by the defendant as aforesaid was calculated to and had the tendency and effect of leading the public to believe [fol. 7] that the defendant, contrary to the fact, was incorporated as a "savings bank" with all of the attendant public safeguards and benefits.

Seventh: That the use of such words "saving" or "savings" by the defendant as aforesaid was, and the continued use by the defendant thereof, is in violation of the provisions of Section 258, subdivision 1 of the Banking Law of the State of New York.

Eighth: That the plaintiffs, prior to the institution of this action, have demanded that the defendant terminate the use of the word "saving" or "savings" or their equivalent in its banking, financial business and dealings with the public in the State of New York and that said defendant exclude same from its signs and advertising matter circulated by it in the solicitation of business and deposits from the public in violation of such statute, but the defendant has failed and refused so to do.

(Paragraph Eight-A added on trial; allegations denied by defendant. See *infra*, pp. 115-116.)

Ninth: That the plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs demand that a temporary injunction issue out of this Court and that the plaintiffs have a permanent injunction enjoining and restraining the defendant, its officer, agents, servants and employees from advertising in any manner or form or exposing any sign as a savings bank and/or soliciting or receiving deposits as a [fol. 8] savings bank in the State of New York and from using the term "saving" or "savings" or their equivalent in the defendant's banking, financial business and dealings with the public in the State of New York; and that the plaintiffs have such other and further relief as may be just and equitable in the premises together with the costs and disbursements of this action.

Nathaniel L. Goldstein, Attorney General of the
State of New York, Attorney for Plaintiffs.

(Verified by Assistant Attorney General Irving L. Rollins on May 12th, 1950.)

IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF
NEW YORK

ANSWER—June 19, 1950

Defendant, by its attorneys, Alley, Cole, Grimes & Friedman, for its answer to the complaint:

First: Denies each and every allegation contained in paragraph "Second" of the complaint, except that it admits that Section 258, Subdivision 1, of the Banking Law of the [fol. 9] State of New York reads as follows:

"No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings', or their equivalent in relation to its banking or financial business, nor shall any individual or

corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

Second: Denies each and every allegation contained in paragraph "Third" of the complaint, except that it admits that it is not a savings bank organized under, or subject to, the laws of the State of New York or authorized to represent itself as such.

[fol. 10] Third: Denies each and every allegation contained in paragraphs "Fourth" and "Fifth" of the complaint, except that it admits that it has used the term "saving" or "savings" in its business.

Fourth: Denies each and every allegation contained in paragraph "Sixth" of the complaint.

Fifth: Denies each and every allegation contained in paragraph "Seventh" of the complaint.

Sixth: Denies each and every allegation contained in paragraph "Eighth" of the complaint, except that it admits that plaintiffs, prior to the institution of the action, demanded that the defendant terminate the use of the words "saving" or "savings" in its advertising.

Seventh: Denies each and every allegation contained in paragraph "Ninth" of the complaint.

For a complete defense to the alleged cause of action set forth in the complaint defendant alleges:

Eighth: Defendant is a national banking association having its principal office and place of business at Franklin Square, Long Island, New York.

Ninth: Defendant has, since its organization in 1926, carried on a general banking business as a national banking

association and in the course of such business has accepted savings and other time deposits, as well as demand deposits. [fol.11] Tenth. In carrying on its business as aforesaid, defendant has placed various signs on its banking premises containing the word "savings" and has from time to time advertised the fact that it accepts savings deposits.

Eleventh. Defendant's said activities have been duly approved by the Comptroller of the Currency, the government administrative officer charged by the applicable Federal statutes with the supervision of defendant.

Twelfth. Defendant's said activities are, and have been duly authorized and sanctioned by the Federal statutes relating to national banking associations and their operations, including, among others, the following Federal statutes, to wit: 12 U. S. C. A. § 24; 12 U. S. C. A. § 371; 12 U. S. C. A. §§ 583-585; 588a, as well as the duly adopted regulations of the Board of Governors of the Federal Reserve System.

Thirteenth: Section 258, Subdivision 1, of the Banking Law of the State of New York provides as set forth in Paragraph "First" hereof.

Fourteenth. In so far as said Section 258, Subdivision 1, of the Banking Law of the State of New York purports to relate to this defendant and other national banking associations, and in so far as it purports to prohibit national banks from accepting savings deposits or making use of the terms "savings" or "savings", the same is invalid for the following reasons, among others, to wit:

[fol.12] a. The said statute is in direct conflict with the Constitution and the paramount laws of the United States;

b. The said statute unduly interferes with and hinders the operations of instrumentalities of the Federal government, to wit: national banking associations located in New York State, and frustrates the purposes for which they were organized; and

c. The said statute unduly discriminates against national banking associations located in New York State and handicaps them substantially in competition with savings banks and savings and loan associations.

Wherefore, defendant demands judgment that the complaint be dismissed.

Dated: New York, New York, June 19, 1950.

Alley, Cole, Grimes & Friedman, Attorneys for Defendant.

(Verified by Arthur T. Roth, President of Respondent Bank, on June 19th, 1950.)

[fol. 13] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU

BILL OF PARTICULARS

Plaintiffs for their Bill of Particulars respectfully show to the Court and allege:

First. That the defendant herein in violation of the provisions of Section 258, Subdivision 1 of the New York State Banking Law, has continuously since the year 1947 to the date hereof in its banking, financial business and dealings with the public used the term "saving" or "savings" as alleged in paragraph "Fourth" of the complaint in the circumstances as follows:

1. That defendant's bank operated and maintained by the defendant in the Village of Franklin Square, Nassau County, State of New York was and still is housed in two connected buildings which are separated in three sections, viz.,

(a) Defendant has used and still uses the main floor of the corner building for commercial accounts only;

(b) The main floor of the adjoining contiguous building facing Franklin Square was and still is used by the defendant for receiving "savings" accounts. A small opening measuring 5 foot in width connects the commercial and "savings" department of the defendant's bank;

[fol. 14] (c) In the back of the "savings" department aforementioned, the defendant has used and still uses the spaces for its loan department and "family lobby".

That the main floor of the building used for the "savings" accounts aforementioned had and still has many printed

signs located in conspicuous places throughout an area measuring approximately 1,500 feet which includes the word "savings". One large sign is about three feet long and one foot wide hanging from the ceiling reading "savings". In back of this large sign there are six tellers' windows, five of which had and still have glass signs reading "Savings" "Christmas Club" and the sixth widow had and still has a sign reading "Children's Savings".

That the building wherein the defendant maintained and still maintains its "savings" department for its "savings" accounts is constructed and was and still is maintained as and gives the appearance of any modern savings bank in the State of New York. The fact that there was and still is a large circular counter in the middle of the floor with the sign that reads "new accounts" tends to support the inescapable conclusion that it is a savings bank and operated as such. Moreover, there was and still is a large conspicuous sign over a teller's window in the "savings" department with the following advertisement:

"2% on savings accounts between \$100 and \$1,000
1½% on balances over \$1,000."

2. That on the depositors' counters in the said building [fol. 15] housing the defendant's savings department, the defendant placed for public use and consumption printed handbills and circulars soliciting savings accounts from the public and the printed matter thereof contained the prohibited term "saving" or "savings". The same were in fact distributed to the public in such manner. The text and language of such handbill and circular was contained in Exhibits A and B of plaintiffs' moving papers in a motion heretofore made by the plaintiffs for a temporary injunction herein, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau. Such handbill and circular also was distributed by the defendant by including same in defendant's monthly checking account statement to its many depositors. All in all, approximately 14,000 of these handbills and circulars were distributed by the defendant in the manner aforesated.

3. That on the depositors' counters in the said building housing the defendant's savings department, the defendant

placed for public use and consumption printed deposit and withdrawal slips which contained the word "savings". The text and language thereof is contained in Plaintiffs' Exhibits I and J of plaintiffs' moving papers in a motion heretofore made by the plaintiffs for a temporary injunction herein, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau. The same were in fact distributed to the public in such manner.

4. That on the counters in the said building housing defendant's savings department bearing the sign "New [fol. 16] Accounts" the defendant placed for public use and consumption coin savings paper cards to encourage savings on which the word "savings" appeared. The same were in fact so distributed in large numbers to the public in such manner. The text and language of such printed matter is contained in Exhibit K of plaintiffs' moving papers in a motion heretofore made by the plaintiffs for a temporary injunction herein, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau. Approximately 20,000 of these coin saving paper cards were printed by the defendant and distributed in the aforementioned manner, in addition to the delivery by hand of the same by the defendant through the Federal Distribution Corp., and/or Peck Federal Distribution Corp., an advertising agency employed by the defendant for such purpose.

5. That at or prior to the opening of defendant's branch bank on June 7, 1950 at Levittown Center, 2943 Hempstead Turnpike, Levittown, Nassau County, New York or soon thereafter, defendant circulated by hand through the Federal Distribution Corp, and/or Peck Federal Distribution Corp. an advertising agency employed by the defendant for such purpose, an envelope containing the printed circulars and/or handbills soliciting savings accounts for the defendant's savings department, upon which was contained the printed term "saving" or "savings". The text and language of such handbills and/or circulars is contained in Plaintiffs' Exhibits IX A to IX K inclusive received and [fol. 17] marked in evidence in defendant's examination

before trial on September 18, 1950. Approximately 15,000 thereof were delivered and circulated to the public in Nassau County, State of New York.

6. That around the middle of June, 1948, the defendant in soliciting savings accounts for its savings department printed and circulated a handbill approximately 15,000 in number to the public at large by delivering to same by hand through the Federal Distribution Corp., and/or Peck Federal Distribution Corp., whereon was contained the prohibited term "saving" or "savings". The exact text and language appears in Plaintiffs' Exhibits 10A, 10B and 10C which were received in evidence in defendant's examination before trial herein.

7. That in the year 1949 the defendant distributed to the public approximately 6,000 copies of its printed annual report of the defendant bank for the year 1948, and wherein was contained the printed term "saving" or "savings". A copy of such annual report referred to is annexed to the defendant's affidavit interposed by the defendant in opposition to plaintiffs' aforementioned motion for a temporary injunction, and which is on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau.

8. That the defendant from time to time since the year 1947 through persons directly employed by the defendant and through advertising agencies orally made direct solicitation of the public in the County of Nassau, State of New York, for savings accounts for the defendant's savings department, and they in making such solicitation were directed by the defendant to use and did use the term "saving" or "savings" or their equivalent.

9. That the defendant solicited savings accounts in printed advertisements in various newspapers as hereinafter stated in paragraph "Second" hereof and included in its advertising matter in such newspapers the word "saving" or "savings" as likewise therein stated.

Second. That since the year 1947 defendant has solicited savings accounts in printed advertisements in various newspapers and included in its advertising matter the word "saving" or "savings" or their equivalent. Such adver-

tisements appeared in the newspapers hereinafter mentioned and at the dates as follows :

1. March 8th or March 10th, 1947, The Long Island Daily Press.
2. March 17, 1947, Nassau Daily Review-Star.
3. March 24, 1947, The Long Island Daily Press.
4. May 7th or May 8th, 1948, Newsday.
5. June 17, 1948, Newsday.
6. January 4, 1949, Newsday.
7. January 5, 1949, Nassau Daily Review-Star.
8. March 29, 1950, Newsday.
9. March 29, 1950, Nassau Daily Review-Star.

[fol. 19] Copies of the aforementioned advertisements and each of them are contained in Exhibits A to H inclusive annexed to plaintiffs' moving papers in a motion for a temporary injunction made by them, now on file with the papers in the above entitled action in the office of the Clerk of the County of Nassau; also copies thereof were received as Plaintiffs' Exhibit I to VIII inclusive in defendant's examination before trial on September 18, 1950.

The aforementioned three newspapers, viz., the Long Island Daily Press, Nassau Daily Review-Star and Newsday were and still are daily publications. In addition thereto, the defendant since the year 1947 to the present date hereof, in soliciting the public for savings accounts for its savings department used newspapers other than the three aforementioned, and employed in its advertising matter the term "saving" or "savings" therein. These other additional newspapers mentioned are The Franklin Square Bulletin, the Levittown Tribune, and the Mid-Island Herald, Hicksville, Long Island, all of which are weekly newspapers.

Third: The acts complained of as alleged in the complaint and amplified by the facts hereinbefore stated violated the provisions of Section 258, subdivision 1 of the New York State Banking Law because the defendant as a national bank had no power to engage in business as a savings bank in the State of New York, and that the defendant by the acts complained of has practiced fraud and deception on the public by sign and representation in advertising [fol. 20] for savings accounts by using the prohibited term

“saving” or “savings” and in the use of such terms in its dealings with the public, the defendant not only committed a public nuisance but usurped the rights and franchises reserved exclusively for savings banks authorized to do business as such in the State of New York under the provisions of Section 258, subdivision 1 of the New York State Banking Law.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Plaintiffs.

(Verified by Assistant Attorney General Irving L. Rollins on September 26th, 1950.)

IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF
NEW YORK

Present: Hon. James B. M. McNally, Justice.

ORDER CHANGING VENUE—July 14, 1950

A motion made by the defendant for an order directing that the place of trial in this action be changed from the [fol. 21] County of New York to Nassau County, upon the specific and sole ground that the defendant, a national bank established in the County of Nassau may be sued only in the county in which it is established, under the express provisions of the National Banking Act (12 U. S. C. A. § 94) having duly and regularly come on to be heard before me on the 7th day of July, 1950, and Alley, Cole, Grimes & Friedman, Esqs., the attorneys for the defendant, by Norman S. Dike, Jr., Esq., of counsel, having appeared in support of said motion, and the Honorable Nathaniel L. Goldstein, Attorney General of the State of New York, the attorney for the plaintiffs herein, by Irving L. Rollins, Esq., Assistant Attorney General of the State of New York, of counsel, having appeared in opposition thereto, and said motion having been submitted for determination without oral argument,

Now, upon reading and filing the notice of motion herein, dated June 12, 1950, the affidavits of Arthur T. Roth and Sidney Friedman, both respectively sworn to the 12th day

of June, 1950, and a copy of the demand made by the defendant for a change of venue, dated May 29, 1950, thereto annexed as an exhibit, together with due proof of service of each thereof all in support of said motion, and the answering affidavit of Irving L. Rollins, sworn to the 23rd day of June, 1950 and a copy of the defendant's answer herein, annexed thereto as an exhibit, and the affidavit of Irving L. Rollins, sworn to the 2nd day of June, 1950, served by the plaintiffs upon the defendant in compliance with Rule 146 [fol. 22] of the Rules of Civil Practice and read upon said motion as an exhibit, all in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Court, it is

Ordered that the defendant's said motion be and the same hereby is in all respects granted; however, without prejudice to any and all proceedings heretofore had herein and to any and all intermediary orders made and entered in the above entitled action; and it is further

Ordered that the Clerk of the County of New York upon the payment of any fees due him, if any, be and he is hereby directed to forthwith deliver to the Clerk of the County of Nassau all papers filed with him in the above entitled action and certified copies of all minutes and entries relating thereto, for filing, entry and recording by the Clerk of the County of Nassau, in compliance with the provisions of Section 188 of the Civil Practice Act; and it is further

Ordered that the Clerk of the Supreme Court, New York County, be and he hereby is directed and authorized to forthwith deliver to the Clerk of the Supreme Court, Nassau County, the moving papers filed by the plaintiffs herein in support of a pending and undetermined motion made by them, returnable on July 17, 1950, at Special Term, Part I of the Supreme Court, New York County, for an order directing the defendant to appear and submit to an examination before trial as an adverse party, pursuant to the [fol. 23] provisions of Section 288 et seq. of the Civil Practice Act; and to preserve the status quo of said motion, it is hereby directed and

Ordered that the same be and hereby is transferred to the Supreme Court, Nassau County, to be heard and determined by the Justice there presiding, on July 26, 1950 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel

can be heard, and for said purpose the aforesaid pending and undetermined motion shall be deemed adjourned from the original return date thereof, to wit, July 17, 1950, to July 26, 1950.

Enter,

J. B. M. Mc., J. S. C.

IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF
NASSAU

Present: Hon. Thomas J. Cuff, Justice

JUDGMENT APPEALED FROM—June 7, 1951

The issues in this action having been brought on for trial before Mr. Justice Thomas J. Cuff without a jury at a Special Term Part II of this Court held on the 22nd day of January 1951 at the Nassau County Courthouse, Mineola, N. Y., and the issues having been duly tried, and the defendant thereupon at the close of all the evidence having moved for judgment dismissing the complaint, and the said complaint having been dismissed upon the merits, with costs, and the Court having made and filed a decision in favor of the defendant and against the plaintiffs containing a statement of the facts found and the conclusions of law thereon, and directing judgment in favor of the defendant, dismissing the complaint upon the merits, with costs and the defendant's costs having been duly adjusted on notice at the sum of \$96.30:

Now, on motion of Alley, Cole, Grimes & Friedman, attorneys for the defendant, it is

Adjudged and decreed, that the plaintiffs' complaint be and the same is hereby dismissed, upon the merits, and that the defendant, The Franklin National Bank of Franklin Square, recover of the plaintiffs, The People of the State of New York, the sum of \$96.30 costs as taxed, and have execution therefor.

Enter,

Cuff, Justice of Supreme Court.

Granted, June 7, 1951. Chas. E. Ransom, Clerk.

Entered, June 8, 1951. Chas. E. Ransom, County Clerk of Nassau County.

[fol. 25] IN SUPREME COURT, NASSAU COUNTY

SPECIAL TERM—PART II

Case and Exceptions

Mineola, New York, January 22, 1951

Before Hon. Thomas J. Cuff, J.

APPEARANCES

National Goldstein, Esq., Attorney General, by Irving L. Rollins, Esq., Deputy Attorney General, for the Plaintiff.

Alley, Cole, Grimes & Friedman, Esqs., Attorneys for the Defendant, by Charles P. Grimes, Esq., Sidney Friedman, Esq., and Herbert Dannett, Esq., of Counsel.

(Adjourned to January 23, 1951.)

Mineola, New York, January 23, 1951

The Court: Did you want to make an opening?

Mr. Rollins: It would be like carrying coals to Newcastle, I think.

[fol. 26] Mr. Grimes: I shall try not to be long, but I would like to make an opening statement.

The Court: It would be a good idea.

OPENING STATEMENT

Mr. Grimes: The State of New York is asking for a permanent injunction. It is seeking to prevent the defendant, Franklin National Bank of Franklin Square, called the Franklin National Bank, from using the word, "saving" or its plural form "savings" in connection with its business in any way, and from advertising, soliciting or receiving deposits as a savings bank. There was a motion for a preliminary injunction, which was denied by the Supreme Court, New York County, on a technical ground, upon the ground that the action was brought by the Attorney General in the wrong forum. That was sustained. It was also brought on the ground, and also dismissed on the ground that no case had been made out under the law for a preliminary injunction. In this case I do not want anything

I say to indicate in any way that we think there has been a decision on the merits or there has not been. It is entirely for this Court.

We are dealing with a rather peculiar statute which contains more than meets the eye. Section 258, sub-division 1, of the Banking Law provides that no bank, trust company, and by name, National Bank, individual, partnership, unincorporated association or corporation; in other words, [fol. 27] no National Bank or any other type of bank other than a savings bank, or savings and loan association, shall make use of the words, "saving" or "savings", or their equivalent, in relation to its banking or financial business; nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank.

In other words, the first thing one notices about this statute is it sets up a favored, special class savings banks and savings and loan associations, which alone may use the word "saving" or "savings" in or in relation to their banking and financial business. It may strike one who has not gone into the facts, as we have been obliged to, rather peculiar that this action should have been brought at all. At first blush it sounds as though there was a great deal to do about one word, the word "savings", whether used in the single or plural form. I can assure you that before we are through with our proof the importance of those words, "saving and savings", will become very significant.

On the importance of those words we feel obliged to put on witnesses, and to adduce a very considerable amount of proof, to show the restriction by the statute of New York of the words "saving" and "savings" to savings banks and savings and loan associations is an unconstitutional application of its sovereign power, for the reason if a National [fol. 28] Bank, such as the Defendant here, is not authorized to use those words, which, as we shall show, are of the utmost importance in our business, there is an unwarranted, unlawful and unconstitutional interference with our rights as a National Bank, rights granted by the Federal Government, and the statute must be held void in so far as any application is claimed as to us.

The complaint in this case is of a rather vague nature. It charges we have used the word "savings" in, and in

connection with our banking business, in our signs and advertising. There is no question about that. We have, we do, and we intend to continue to do so under what we claim is a Federal grant of power unless and until prevented by the action of this or some other Court of competent jurisdiction.

There is, however, a second part to this case, in which they say we are palming ourselves off as a savings bank—those are not the exact words, but that, I think, is a fair shorthand expression of what they claim we did. Probably (and this is pure speculation, because we do not now know) they are making that contention because of a case which appears in our brief and their brief, with which you are no doubt familiar, in which the Court of Appeals said in substance that a charge under the statute will not properly lie [fol. 29] against a commercial bank for using the same forms and doing business in the same manner as a savings bank; that such charge will only lie where there is some form of deception practice on the public. We were not sure when we received their bill of complaint just what the whole scope of the allegations was, so we asked for a bill of particulars in which they particularize in the following manner: They charge that by the use of our forms as we do, and by the use of advertising including the word “savings”, and by the very structure and nature of our building, we have done the following things: we have deliberately committed fraud; we have deliberately, even by our architecture, undertaken to deceive the public; that we have usurped the right to a franchise granted by the State of New York exclusively to savings banks; and that we have committed a public nuisance, in some manner not at all clear to me, except that I gather from this plainly they are going to ask you to abate us.

These are very serious charges; they are charges unpleasant to hear; they are charges which, as I suggested yesterday, will be met head-on, and will be met by the testimony of a number of reputable witnesses on all points.

Thus, a number of issues of fact are raised merely by that aspect of the complaint, and in addition a number of issues of fact are squarely raised by the answer which we inter- [fol. 30] posed based upon an unbroken line of cases begin-

ning with the great case of *McCulloch versus Maryland*. With your Honor's permission I would like to discuss that case somewhat at length because everything of substance which is before this Court in this case in my opinion was before the great Judge Marshall in *McCulloch versus Maryland*, for there like here, a State acting in behalf of a special class endeavored to interfere with the power of the Federal Government in what many lawyers at that time felt the Federal Government had under its constitution.

OPENING STATEMENT

Mr. Rollins: The history of the National Bank is not in issue here, because any such history is but a smoke screen invoked in this court to cover up acts of which we complain. There is no question any bank doing business in this State or elsewhere by virtue of being a bank, has a right to receive deposits, be it a savings bank, National bank or any other kind. We do not say a National Bank cannot accept deposits and pay interest thereon. In the *People of the State of New York against Binghamton Trust Company*, 139 N. Y. 185, the Court specifically said it was not intended by the statute, Section 258 of the Banking Law, the subject of this case, to create a monopoly as to business methods in favor of State banks or any other bank. The Court did say the purpose of the statute was to protect the public against deception or pretense of a bank that it is a savings bank. The Federal Statutes creating the defendant National bank, made it a citizen of the State of New York, and subjected all National Banks to rules and regulations, and the law of [fol. 31] each particular State. Same granted power to any State, to regulate its business except in minor particulars not applicable here.

The United States Supreme Court held that the business of a savings bank is a matter of state regulation. We say, and agree with counsel, if there is a Federal statute in existence today, which grants them express power to use the word "saving" or savings", then same will be controlling. However, we deny that there is such a Federal statute in existence. It is settled law today that a Federal statute supersedes a conflicting State statute. I say this, there is no such statute and they know that, so they come into court

and say it must be implied. But as I have pointed out in my memorandum, in which I cite the leading case in the United States Supreme Court, with which I believe you are familiar, i. e., *First National Bank of St. Louis vs. Missouri*, 263 U. S., it appears that the power to use the words "saving" or "savings" is not granted to a National Bank, by the National Bank Act.

If it withheld those powers, if they were not granted, as we contend, they were withheld by the National Banking and Federal Reserve Acts. No such power may be implied because of the rule (reading). I say to you, only if we stretch the statute beyond its meaning, can we say they have a right to advertise their wares. We say further they have a right to say they receive deposits, but not by use of the word "saving" or "savings". Only if you stretch that statute beyond its meaning, and put therein language that was withheld by the Federal statutes only then can you conclude that Section 258 has been superseded. I say [fol. 32] evidence if offered in this case, showing motives for bringing this action, would not be material, nor competent in this trial. I think I point that out at page 31 of my brief. The reasonableness of the New York statute,—as my memorandum points out to you Honor,—in its present state, and whether it should be continued is not before the Court. The Supreme Court of the United States, as I have stated in my memorandum in *Powell v. Pennsylvania*, 127 U. S. 678, at page 686 pertinently said (reading):

Mr. Rollins: I ask your Honor to take judicial notice of all banking business methods.

COLLOQUY

The Court: Was there some agreement or concession you thought ought to be on the record?

Mr. Grimes: He asked your Honor to take judicial notice of all banks and banking business, in which we heartily concur.

The Court: I do not think I can take judicial notice of the banking business.

Mr. Rollins: I will start reading from the examination before trial of the defendant, Franklin National Bank of Franklin Square, conducted on September 18, 1950 at the

office of the defendant bank here in Nassau County, specifically the deposition——

The Court: Are you going to read the entire deposition?

Mr. Rollins: Yes.

The Court: Do you have any copies of it?

Mr. Rollins: Specifically the deposition of Arthur T. Roth, defendant's president, in pursuance of an order made by Justice Stoddart, dated July 26, 1950, made in this action and entered in the office of the Clerk of the County of Nassau, July 26, 1950.

[fol. 33] The Court: If you have a copy I would like to have it. If you are going to read the deposition, offer it in evidence and it will be marked, and the reporter will be able to have it for his record.

Mr. Rollins: I offer in evidence deposition referred to.

Mr. Grimes: As long as it is the original, no objection at all.

(Paper received in evidence and marked Plaintiff's Exhibit 1 reproduced hereunder, pp. 33-54; and marked without number. See p. 35.)

The Court: Put a notation that the exhibits offered by the plaintiff will continue in rotation commencing with Arabic 1. Proceed.

Direct examination.

By Mr. Rollins:

Q. What is your name?

A. Arthur T. Roth.

Q. Where do you reside, sir?

A. 344 Harvard Avenue, Rockville Centre, Long Island, New York.

Q. Are you an officer of the Franklin National Bank of Franklin Square, the defendant in this action?

A. Yes, I am.

(Mr. Dannett takes the stand as a witness.)

Q. What officer are you?

A. President of the bank.

Q. How long have you been such president?

A. Approximately four years.

Q. And are you also a member of the Board of Directors of the defendant?

A. Yes, I am.

Q. How long have you been such director?

A. Approximately ten years.

[fol. 34] Q. And during the last ten years have you been actively engaged daily in the affairs of the defendant bank?

A. Yes, I have.

Q. And are you conversant with its affairs?

A. I am.

Q. During the last ten years have you held any other office in the Franklin National Bank of Franklin Square other than president?

A. Yes, that of executive vice-president and also that of cashier.

Q. You have held these respective offices of the defendant bank continuously during the last ten years?

A. I have.

Q. Since the year 1947 and continuously to the present date hereof, did the defendant bank have a savings department?

A. Yes, we have.

Q. And that answer goes for at least the year 1947?

A. That is correct.

Q. Since the year 1947 and continuously to the present date, did the defendant bank employ any advertising media to solicit saving accounts for its savings department?

A. Yes.

Q. Will you please enumerate the mode and character of such advertising media?

A. Through the newspapers, direct mail, hand bills and house to house solicitation.

Q. When the defendant advertised for savings accounts for its savings department in the newspapers as mentioned by you, did the defendant advertise in three newspapers, to wit: The Nassau Daily Review-Star, Long Island Press and Newsday, three separate newspapers?

A. Yes, we did.

Q. I show you a clipping of an advertisement appearing in the Long Island Daily Press on March 10, 1947,

[fol. 35] and ask you whether or not such advertisement was inserted in such newspaper by the defendant on March 10, 1947?

A. According to our records, that ad. appeared on March 8, 1947.

Q. And was such advertisement authorized?

A. Yes.

Q. And did such advertisement appear in the Long Island Daily Press either on March 8, 1947 as you say or on March 10, 1947 as we claim?

A. Yes.

Q. And at that time was the defendant known by the name of the Franklin Square National Bank?

A. Yes.

Mr. Rollins: I offer the advertisement referred to in evidence.

The Court: Mark it.

(Paper received in evidence and marked Plaintiff's Exhibit 1.)

Q. I show you a clipping from the Nassau Daily Review-Star dated March 17, 1947 and ask you whether or not the advertisement appearing therein was authorized by the defendant?

A. Yes, it was authorized by the bank.

Q. And did such advertisement appear in such newspaper on the day mentioned when circulated by the newspaper?

A. Yes.

Q. And did the defendant pay the Nassau Daily Review-Star for such advertisement?

A. Yes.

The Court: Mark this deposition in evidence without any number.

(Paper received in evidence and marked Plaintiff's Exhibit 2.)

[fol. 36] Q. I show you a newspaper clipping from the Long Island Press published therein on March 24, 1947 and ask you whether or not that is an authorized advertisement of the defendant?

A. Yes.

Q. And did such advertisement appear in such newspaper on March 24, 1947?

A. Yes.

Q. Did the defendant bank pay the Long Island Press for such advertisement?

A. Yes.

Mr. Rollins: I offer the newspaper clipping referred to in evidence.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 3.)

Q. I show you a newspaper clipping appearing in Newsday of its issue on May 8, 1948 and ask you whether or not such advertisement was placed by the defendant with such newspaper?

A. According to our records, this ad. appeared on May 7, 1948.

Q. Was it authorized by the defendant?

A. Yes, it was.

Q. Did the defendant pay Newsday for such advertisement?

A. Yes.

Q. Did such advertisement appear in Newsday either on the 7th or 8th of May, 1948?

A. Yes.

Mr. Rollins: I offer the clipping referred to in evidence.
The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 4.)

[fol. 37] Q. I show you a newspaper clipping showing an advertisement of the defendant in Newsday, appearing on June 17, 1948 and ask you whether or not the same was inserted and circulated by the newspaper on June 17, 1948 by the defendant's direction?

A. Yes.

Q. Did the defendant pay for such advertisement to Newsday?

A. Yes.

Mr. Rollins: I offer the newspaper clipping referred to in evidence, just the clipping itself.

The Court: Mark the clipping.

(Received in evidence and marked Plaintiff's Exhibit 5.)

Q. I show you a newspaper clipping showing an advertisement of the defendant in Newsday on January 4, 1949 and ask you whether the same was inserted by the defendant's direction in such newspaper on such day?

A. We have no record of this ad. appearing in Newsday, but we do have a record of a similar ad. appearing in the Nassau Daily Review-Star on January 5, 1949.

Q. Is there any mark of identification to show in what paper this particular ad. to which I now refer appeared?

A. Yes, the page number is that of Newsday.

Q. Do you question the date of January 4, 1949?

A. No, I have no reason to.

Mr. Rollins: I offer the advertisement referred to in evidence.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 6.)

[fol. 38] The Court: Let it appear of record the underlining of the words, "savings account" was not in the advertisement, and that that was done by counsel to draw the Court's attention.

Mr. Rollins: That is right. I meant to mention that fact. I just noticed it myself. They admit that.

The Court: I know, but we must have the record. When exhibits are printed those things come up as if they were printed originally. You have a right to underline it, but it is our obligation to anybody else to show what is the record.

Q. I show you a newspaper clipping showing the advertisement of defendant in Newsday on March 29, 1950 and ask you whether or not the same was inserted by the defendant's direction?

A. Yes, it was.

Q. Did this advertisement appear in Newsday on March 29, 1950?

A. Yes, it did.

Q. Did the defendant pay Newsday for such advertisement?

A. Yes.

Mr. Rollins: I offer the newspaper advertisement referred to in evidence, calling the Court's attention the underlined portion was done by counsel.

The Court: That is so with respect to at least two other exhibits. I noticed the word "savings" underlined.

Mr. Rollins: May I have the record indicate that I did underline the word "savings."

(Paper received in evidence and marked Plaintiff's Exhibit 7.)

[fol. 39] Mr. Rollins: May I call your Honor's attention to this Exhibit 7, while it uses "savings" at the beginning, it attempted to equivocate and start to put the word "thrift" thereunder, thrift account, so they used it interchangeably.

Mr. Grimes: I move the remarks be stricken from the record. Irrelevant.

The Court: I do not mind those observations as you go along.

Mr. Grimes: I withdrew the motion.

The Court: In this exhibit, this is the only part that has any bearing on the acts, is it not?

Mr. Rollins: Yes, on the top, savings.

Q. I show you a newspaper clipping of the Nassau Daily Review-Star of March 29, 1950 and ask you whether or not the defendant's advertisement appearing therein was inserted by the defendant's direction?

A. Yes, it was.

Q. And did the defendant pay the Nassau Daily Review-Star for such advertisement?

A. Yes, we did.

Q. And did such advertisement appear in the Nassau Daily Review-Star on March 29, 1950?

A. Yes.

Mr. Rollins: I offer the newspaper clipping referred to in evidence. I have given counsel photostatic copies of all of these in advance of trial, so they have photostats. That is the reason in the stipulation of counsel I need only mention what date they appeared on.

(Received in evidence and marked Plaintiff's Exhibit 8.)

[fol. 40] The Court: This looks like the same copy.

Mr. Rollins: Practically the same.

The Court: Different newspapers.

Q. Did the defendant between the year 1947 to the present date hereof use any other newspapers other than the three mentioned, that is the Long Island Daily Press, Nassau Daily Review-Star and Newsday to advertise for savings accounts using the term, "saving" or "savings"?

A. Yes, I believe we did.

Q. What newspapers were they?

A. The Franklin Square Bulletin, the Levittown Tribune and the Mid-Island Herald, Hicksville, Long Island, all of which are weekly newspapers.

Q. Now, these papers, the Long Island Daily Press, the Nassau Daily Review-Star and the Newsday, are they newspapers which are published daily?

A. Yes, they are.

Q. Do you know the circulation of all these newspapers or any of them numerically?

A. That I do not know.

Q. At the time or prior to the advertisements appearing in Plaintiff's Exhibits 1 to 8 inclusive, did the newspapers wherein such advertisements appeared, represent to you the circulation of their respective newspapers?

A. No, they did not.

Q. Did you make any inquiry of anybody else from the defendant bank?

A. We knew they were substantial and that they covered the area we wanted them to cover.

Q. What area do you refer to?

A. Nassau County.

[fol. 41] Q. That's in the State of New York?

A. That is right.

Q. Now, in making direct solicitation for savings ac-

counts, did the defendant use an advertising agency or person directly employed by the bank?

A. At times we used an advertising agency and at other times Mr. Green, our Vice-President in charge of advertising and publicity, handled it himself.

Q. What is the first name of Mr. Green?

A. Charles W. Green.

Q. Did you tell the agency and employees so employed to solicit savings accounts for the defendant to use the term, "saving" or "savings" or their equivalent?

A. Yes, we did.

Q. And did they to your knowledge use such terms?

A. Yes, they did.

Q. And such terms were used with the knowledge, direction and consent of the defendant corporation?

A. Yes, it was.

Q. What was the exact address of the defendant bank at Franklin Square?

A. 315 Hempstead Turnpike, Franklin Square, Long Island, Nassau County, New York.

Q. Has the defendant bank a branch in Levittown Centre, at 2943 Hempstead Turnpike, Levittown, New York?

A. Yes, we do.

Q. When did the defendant open such branch?

A. June 7, 1950.

Q. At or prior to the opening of the defendant branch at Levittown Centre, 2943 Hempstead Turnpike, Levittown, New York, or soon thereafter, did the defendant circulate through the mail in Nassau County printed matter which I now show you contained in an envelope?

A. Yes, we did circulate these items, however, they were [fol. 42] not sent by us through the mail but delivered by hand by the Peck Federal Distribution Corp.

Q. What is their address?

A. Downtown New York.

Mr. Rollins: I offer these in evidence as one exhibit and request the Court at this time they be marked Plaintiff's Exhibits 9-A to 9-K inclusive.

The Court: All right. Mark the envelope.

(Envelope received in evidence and marked Plaintiff's Exhibits 9-A to 9-K inclusive.)

Mr. Rollins: And its contents?

The Court: I want to show what it is. Exhibits marked 9-A to 9-K contain ten pieces of paper which would seem to be literature, envelopes, deposit slips, various forms which treat with the carrying on of a savings account with the bank.

Q. How many of those envelopes containing these various items marked 9-A to 9-K inclusive were sent to individuals in Nassau County?

A. I believe approximately 15,000 were delivered to individuals.

Q. Did the defendant bank use such media of advertisement with respect to its main office here in Franklin Square?

A. No, we did not.

Q. Now, in its handbills circulated by the defendant in soliciting advertisements for its savings accounts for the defendant bank, did the term "saving" or "savings" or its equivalent appear therein?

A. Yes.

Q. Have you got one of those forms?

[fol. 43] Mr. Rollins: May the record indicate the witness hands Mr. Rollins an envelope containing two papers with printed matter.

Q. Is this the handbill circulated by the defendant?

A. Yes, it is.

Q. Was this one of the handbills circulated by the defendant?

A. Yes, it is.

Q. Would you place the date when such handbill was circulated and delivered?

A. Around the middle of June, 1948.

Q. About how many such circulars were delivered?

A. Approximately 15,000.

Q. And where were they so circulated?

A. In the Franklin Square, Elmont area.

Q. That's in Nassau County, State of New York?

A. Yes.

Q. Were they delivered by hand?

A. Yes.

Q. Did the defendant use any advertising agency or other means of delivery?

A. The Federal Distributing Corp.

Q. Were these circulars to which I refer contained in this envelope?

A. Yes, they were.

Mr. Rollins: I now offer the envelope and the two printed papers referred to as Plaintiff's Exhibits 10-A, B and C.

(Papers were received in evidence and so marked.)

The Court: Note on the record the envelope contains two papers, being printed forms issued by the defendant bank.

(Adjourned to January 24, 1951 at 11 A. M.)

[fol. 44]

Mineola, New York, January 24, 1951.

Trial Continued

The Court: All right, now, let us go along.

(Mr. Rollins continued reading deposition as follows:)

Q. I show you an annual report of the defendant bank for the year 1948 and ask you whether the defendant printed and circulated this annual printed report?

A. Yes, we did.

Mr. Rollins: I offer the same in evidence.

Mr. Grimes: No objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 11.)

Mr. Rollins: For the purpose of the record and an aid of the Court, I direct your Honor's attention to pages 6, 11, 13, 15, 17 and 32 of the report.

The Court: Let me look at them. You have underlined the word, "to save".

Mr. Rollins: Yes.

The Court: What is objectionable, annex between what would be mother and child?

Mr. Rollins: You notice the sign starting with S. A. It will be brought out on another document.

[fol. 45] Mr. Grimes: Something about mother and child, S. A. We will concede it is savings.

The Court: That is just a little sign on a desk.

Mr. Rollins: Page 32. Will your Honor permit me, I would like to read from that exhibit, that is exhibit 10. I read now from the first paragraph of page 6, exhibit 11. "When the term "we" in quotation marks is used to signify banks ramified money transactions, we are very conscious of the fact——

The Court: Wait a minute. Was that your own statement?

Mr. Rollins: What I am reading from exhibit 11, bank's own report.

The Court: All right. I want to make sure this is a quotation.

Mr. Rollins: This is a quotation. "When the term "we" word "we" is placed in quotation in this report, is used to signify banks ramify many transactions we are very conscious of the fact that the majority is not our money. Where then does it all come from? The great majority of it comes from the so-called little man. He is the fellow, who in addition to living on a high standard still has something left to save or invest for future needs. He is the typical American, for almost nowhere else in the world today does this condition exist."

Now, from page 11, which your Honor has noted, and I am reading from exhibit 11. Savings, bold type. In this exhibit it states——

[fol. 46] The Court: Just read it.

Mr. Rollins: "Savings. We had 4,096 thrift accounts at the end of 1944, totaling \$7,423,000. These figures this past year were 19,561 accounts were \$13,691,000, and then in words in dollars." In other words, the figure I just gave you has dollar significance and it is in blank figures, and it follows with the word, in dollars.

The Court: After the word dollars, put a quote.

Q. Did the defendant circulate Plaintiff's Exhibit 11 to the public?

A. Yes, we did.

Q. About how many copies?

A. About 6,000.

Q. And that was all during the year 1948?

A. No, during the year 1949 because this is a report as of the year ending December 31, 1948.

Q. Now, the bank of the defendant maintained at Franklin Square, is it divided into two departments, a commercial department and a savings department?

A. No, that is not so.

Q. Is there any portion of the bank used exclusively for saving accounts?

A. Yes.

Q. What portion of the building is used for savings accounts?

A. A counter which is located in the family lobby of the bank.

Q. And has that portion of the bank used for savings accounts got a separate entrance and exit?

A. No.

Q. Now, this bank of the defendant at Franklin Square, does it consist of two connecting buildings?

A. No.

Q. Would you say the bank is one building?

A. I would say the bank is one building.

[fol. 47] Q. Was any portion of the bank there erected prior to any other additions?

A. We have had some nine or ten major additions, that is, alterations to the bank since 1929.

Q. Now, when was the portion of the bank wherein the savings accounts are maintained added to the bank?

A. During the years 1946 and 1947.

Q. Since the year 1947 to the present date hereof, did the portion of the bank wherein savings accounts are received have signs located therein including the term saving or savings?

A. Yes.

Q. About how many such signs are there?

A. There is one sign which reads, savings and there are six other signs over each teller's window which read, savings—line—Christmas Club.

Q. Well, these signs to which you make reference, how long have they been there?

A. Since about July 1, 1947.

Q. I show you Plaintiff's Exhibits 7 and 8 in evidence and ask you whether or not the defendant had printed and placed in its savings department for circulation to the public handbills identical in text?

A. These were in both the family lobby and the business lobby of the bank.

Mr. Rollins: May I at this time call your Honor's attention those were exhibits received in evidence as 7 and 8, showing the text of the publication in the newspapers mentioned.

The Court: All right.

Q. I see, and when you say this you mean they were printed by the defendant and placed for the persons dealing [fol. 48] ing with the bank?

A. And they were on counters in both the family lobby of the bank and the business lobby of the bank.

Q. When you say family lobby, what do you mean by family lobby?

A. I mean the lobby in which the savings accounts counter is located, and also where we handle the deposits and withdrawals on special checking accounts. Would you want me to enumerate the twenty odd services?

Q. No, you don't have to.

A. We open new accounts for both the savings department, Christmas Club and for special checking accounts, we have our consumer credit department located in the family lobby and there they handle and process applications for automobile loans, home modernization loans, personal loans of various types and we have in the family lobby dealers exhibits, we sell bank money orders, we handle Christmas Club accounts there, we also sell travelers checks in the family lobby, we have our children savings account located there, and we sell U. S. savings bonds, all of these are in the family lobby. We handle the purchase and redemption of U. S. savings bonds in the family lobby, we handle foreign mail and cable transfers in the family lobby, we have a bill paying service in the family lobby, we sell cashiers checks in the family lobby, we handle foreign money exchange transactions in the family lobby, we handle the purchase and sale and exchange of securities in the family lobby. We accept mortgage payments in the family lobby and we have counters and all the necessary facilities for the handling of all of these services enumerated in the family lobby. All of these are located in the family lobby and we estimate that

[fol. 49] the percentage of area devoted to the savings activities is approximately 15 to 20 percent and the balance is devoted to non-savings functions enumerated above.

Mr. Rollins: May I call your Honor's attention at this time that the words "savings activities" which are limited to 15 to 20 percent is not stated in the area. I just want to point that out to you.

Q. Now, coming back to this circular that I have reference to, did you print this particular circular and place it in the family lobby?

A. Yes, we did.

Q. About how many in number?

A. We printed approximately 15,000 copies of this circular.

Q. During what period of time—approximately on what date?

A. Sometime around March, 1950.

Q. And they were placed as you say in the various parts of the bank in the family lobby and the commercial part of the bank?

A. Yes, on—in the family lobby and in the business lobby and we also included the circular in our monthly checking account statements.

Q. And this circular was placed so that the public could pick it up by themselves?

A. Yes, that is correct.

Q. And all of the 15,000 have been used up?

A. Most of them were distributed but I believe that we had a few thousand remaining.

Q. About how many would you say remaining?

A. About 1,000.

Mr. Rollins: I offer the circular referred to in evidence.

[fol. 50] Mr. Grimes: No objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 12.)

The Court: This is that same circular?

Mr. Rollins: That was included in the advertisement, that is published advertisement in newspapers, just a repetition.

Q. I show you a deposit and withdrawal slip taken from

your savings department and ask you whether or not those are the forms of deposit and withdrawal slips authorized and used by the defendant bank since 1947?

A. Yes, they are.

Mr. Rollins: I offer these in evidence as Plaintiff's Exhibits 13-A and B respectively.

Mr. Grimes: No objection.

The Court: Mark them.

(Two papers received in evidence and marked Plaintiff's Exhibits 13-A and 13-B.)

Q. And these Plaintiff's Exhibits 13-A and 13-B, were they located on the depositors' counters for the use of the customers as they came in?

A. Yes, they were.

Q. And since on or about the year 1947, in the defendant's bank were these—these coin saving paper cards printed and distributed by the defendant?

A. We only got these up in 1950 for the first time.

[fol. 51] Q. And were they distributed to the public?

A. Yes.

Q. How many in number would you say?

A. Approximately 20,000.

Q. And how were they distributed?

A. Hand distributed through the Federal Distribution Corp.

Q. And were they also distributed through the counters maintained at your bank's savings department?

A. Yes, in both the family lobby and the business lobby.

Q. And the family lobby, of course, includes the savings department, is that it?

A. Yes, that is correct.

Mr. Rollins: I offer the cards referred to in evidence.

Mr. Grimes: No objection. These are words underlined here.

The Court: All right. Mark it.

(Paper received in evidence and marked Plaintiff's Exhibit 14.)

The Court Let it appear again on the record that the underlining in this exhibit as in other exhibits was not in

the original text, but for convenience has been added by counsel for the plaintiff.

Mr. Rollins: Have you got the originals?

Q. I show you copies of letters dated March 25, 1947, April 3, 1947 and April 16, 1947, addressed to your attention as the president of the Franklin Square National Bank, from the Deputy Superintendent of Banks of the State of [fol. 52] New York, and ask you whether or not you received the original thereof?

A. Yes, we did receive the originals of these letters.

Q. Did you read them, sir?

A. Yes, I did.

Mr. Rollins: I offer these letters referred to in evidence to be marked Plaintiff's Exhibits 15A, B and C.

Mr. Grimes: No objection.

The Court: Mark them.

(Received in evidence and marked Plaintiff's Exhibits 15-A, B and C.)

Mr. Rollins: May the record show counsel for the defendant stipulates that each of Exhibits 15-A, B and C were signed by Charles Schoch, Deputy Superintendent of Banks of the State of New York.

Mr. Grimes: That is a fact. We so concede.

Q. Did the defendant bank since the year 1947 limit the amount of the savings accounts maintained by its depositors?

A. No, we have not.

Q. Since the year 1947 has the defendant bank had depositors whose savings exceeded the sum of \$5,000?

A. Yes, we have.

Q. Do you still have such depositors?

A. Yes, we do.

Q. Approximately about how many depositors has this bank exceeding the sum of \$5000 each?

A. Approximately 582 such accounts.

Q. Could you tell me the maximum amount of savings that any of the depositors have?

A. As of the date when the action was instituted, that is

[fol. 53] on or about May 12, 1950, the largest depositor in our savings department had a deposit of \$36,613.97.

Q. How many depositors did the bank have at the time this action was instituted, that is, May 12, 1950, whose savings accounts exceeded the sum of \$7500?

A. Approximately 137 accounts.

Q. About how many savings accounts depositors did the defendant bank have on May 12, 1950 whose accounts exceeded the sum of \$10,000?

A. Approximately 65 such accounts.

Mr. Grimes: Do you have with you the replies which were made by the bank to the three letters?

Mr. Rollins: I have some letters here. I will let you examine my whole file if — want to. This was pending long before the administration of Mr. Goldstein, the subject of correspondence between the Comptroller of the Currency and with his predecessor, Mr. Bennett, and there has been some attempt to try to stop this practice. I know that.

The Court: We are getting far afield. Counsel simply wants to know do you have the bank's answer.

Mr. Rollins: I do not know what file I have. I will give Mr. Grimes whatever file I have.

The Court: So far as you know——

Mr. Rollins: No.

The Court: You have not seen them?

Mr. Rollins: No.

Mr. Grimes: Would you object to our putting in copies [fol. 54] of the replies if I see fit to do so?

Mr. Rollins: I would have to verify it by the Superintendent of Banks.

The Court: If you think they are important, you offer copies later on.

Mr. Grimes: Will you accept these?

ARTHUR R. SEATON, SR., called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rollins:

Q. Where do you reside?

A. 111-39 204th Street, Hollis, New York.

Q. Mr. Seaton, are you connected with the Department of Banks of the State of New York?

A. I am.

Q. In what capacity?

A. State Bank Examiner.

Q. How long have you been connected with or employed by the State Banking Department?

A. Approximately twenty-five years.

Q. Is your position there an exempt position or in the competitive class?

A. Competitive class.

Q. Were you at one time Deputy Superintendent of Banks of the State of New York?

A. I was Deputy Superintendent of Banks of the State of New York.

Q. Between what years?

A. Between 1930 and 3 or 4.

Q. Your duties as a Bank Examiner, what do they [fol. 55] entail?

A. Examination of institutions under control of the Superintendent of Banks.

Q. Are your instructions in writing under the signature of the Superintendent of Banks of the State of New York?

A. They are.

Q. Have you got those instructions with you?

A. I have an identification card.

Q. Do they include your instructions?

A. Yes. Do not forget to give it back to me, though.

Mr. Rollins: I offer it in evidence.

Mr. Grimes: No objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 16.)

The Court: This is just his authority to act in case anybody asked him. Go ahead.

Q. Did you in the line of duty and the instructions of the Superintendent of Banks visit the place of business of the defendant, Franklin National Bank of Franklin Square in about January of 1950?

A. I did.

Q. Will you tell the Court on what dates you visited those banks and what you observed?

A. I think you have the dates. It was April, was it not?

Q. April instead of January, 1950?

A. April 6, 7, 10 and 11.

Q. What year?

A. 1950.

Q. Will you tell the Court exactly what you observed?

A. I will read my report.

Q. Before you do that, give us the address of the defendant bank, where you went.

[fol. 56] The Court: Would it save time and your record to put the report in evidence after you look at it?

Mr. Grimes: I never looked at it.

The Court: There is only one defendant?

Mr. Rollins: Yes. May I say, bank.

The Court: The defendant. As you are reading that have in mind you are not subscribing to the correctness of it, or the conclusions in it, anything like that, and it is only being offered in lieu of having the witness say those words.

Mr. Grimes: I understand.

The Court: And you can cross-examine. Under those conditions Mr. Grimes makes no objection to the report being received in evidence.

By Mr. Rollins:

Q. Did you make a report to the Superintendent after you investigated at the times that you have mentioned?

A. I did.

Q. Did this report reflect truly, accurately, your observation and the result of your investigation?

A. It does.

Mr. Grimes: Is that the report you are referring to?

Mr. Rollins: The same report that I hold in my hand.

Mr. Grimes: That report reflects truly and accurately his observation?

Mr. Rollins: Yes.

[fol. 57] Q. Did you make this report to the Superintendent of Banks, William A. Lyon?

A. I did.

Q. Gave him the original notes?

A. I did.

Mr. Rollins: I offer it in evidence.

The Court: You offer it to be marked in evidence in lieu of having the witness testify as to the facts contained in it?

Mr. Rollins: Yes.

The Court: To which Mr. Grimes makes no objection as long as it is received under the conditions enumerated by the Court a little while ago. Mark it for the convenience of everybody.

(Paper received in evidence and marked Plaintiff's Exhibit 17.)

Q. Were exhibits 13 and 14 the part of this report that you submitted to the Superintendent of Banks, and to which reference is made in Plaintiff's Exhibit 17?

A. They were.

Mr. Grimes: This is a part of the report?

Mr. Rollins: Yes.

The Court: Could I interrupt a moment just to have a consent put on the record, in the event the Court so desires? Would there be any objection by either side if the Court inspected the premises?

Mr. Grimes: I intended fully to move the Court to inspect the property.

The Court: You have no objection to that?

[fol. 58] Mr. Rollins: I might say as I stated yesterday I want to introduce photographs of the entire bank from every angle.

Mr. Grimes: Nevertheless, I shall still move the Court to inspect the premises.

Mr. Rollins: If the Court wants to do it.

The Court: All right. These are just the same exhibits

we had before, except Mr. Seaton makes them part of his report. All right.

By Mr. Rollins:

Q. On September 18, 1950, did you, in the presence of Mr. Roth and counsel for the defendant in this action, have a photographer make photographs of the outside of the building and the inside of the building?

A. I did.

The Court: Suppose you offer the photographs in evidence and see if there is any objection.

Mr. Rollins: May I ask Mr. Seaton, with the Court's permission, whether the physical condition which you found in April was the same as on September 18, 1950?

The Witness: They were.

Q. The physical conditions there were the same on September 18, 1950 as prevailed in April, 1950?

A. That is right.

Mr. Rollins: I might say for the record I gave to counsel [fol. 59] for the defendant in this action a copy of each one of these photographs, which I now offer in evidence.

The Court: I must pause long enough to commend you for that. Lawyers should always do that.

Mr. Rollins: Thank you. May I ask each one of these photographs be marked separately, because I am going to refer to each one of them.

The Court: They are offered in evidence. Mark them, or any you want marked.

Mr. Grimes: No objection to the introduction of any of those photographs. I am taking counsel's word those are photographs made that day, and I am sure his word is good and we consent as to all of them going in evidence.

The Court: All right. Put them in the order you want them.

By Mr. Rollins:

Q. May I ask you, Mr. Witness, to put them in chronological order, because you know your way around better than I do.

A. (No answer).

(Photographs received in evidence and marked Plaintiff's Exhibits 18-32 inclusive.)

Mr. Rollins: May I have a detailed word description?

Q. These photographs, Plaintiff's Exhibits 18-32 inclusive, [fol. 60] sive, represent the bank, of its main office?

A. Main office only, yes.

Q. Where is it situated?

A. Corner Hempstead Turnpike and James Street. The address is—

Q. 315 Hempstead Turnpike in the Village of Franklin Square, is that right, County of Nassau, State of New York?

A. County of Nassau, State of New York.

Q. Do you know its location, that is, the bank's location with respect to the points of the compass?

A. It is on the southwest corner of Hempstead Turnpike.

Q. How many buildings does this bank consist of, if you recall?

A. Two.

Q. I show you Plaintiff's Exhibit 18 and ask you whether or not this represents the outside of the defendant's main branch?

The Court: Suppose you try to shorten this up if you can. Put the question what does it show as to each exhibit? I think you talked enough to the witness for him to know what you want.

The Witness: It does.

By the Court:

Q. What does that picture show? We will begin that way.

A. This is a picture of the Franklin National Bank situated—

Q. We know that. Exterior of the bank?

A. Exterior of the bank.

By Mr. Rollins:

Q. Where is the savings department located on that Exhibit 18? Will you point out to the Court?

[fol. 61] A. West of the main building, west of the building from the corner.

Q. Is there a separate entrance, that is, entrance, that is, entrance and exit from the savings department to the street?

A. There is.

By the Court:

Q. Is that for the public?

A. For the public, yes.

By Mr. Rollins:

Q. You have used it yourself?

A. I have.

Q. That corner building, what business is conducted there?

The Court: You have two corners.

Q. Those two corners, that is, extreme corners.

A. (No answer.)

By the Court:

Q. Do you call this one building and this another building?

A. Yes, I do.

Mr. Grimes: May we have all three of those—two buildings marked because I intend to use that as the basis of a question. You will observe there is——

The Court: Yes. I will try to get it from the witness so it will be proper evidence.

By the Court:

Q. Do you say there are two buildings or three?

A. I say there is two.

[fol. 62] Q. What do you call that?

A. That, I think, is all one building, built at the same time.

Q. We will have to take it that way for the present. Would you say this is one building?

A. That is one building, yes.

The Court: I marked it 1.

Q. This whole thing is two?

A. Two.

The Court: I will mark it 2. Treat with it that way. It will be on the exhibit. Try and save words for your record.

By Mr. Rollins:

Q. What business was conducted, and is conducted by the defendant in the building on Exhibit 18, marked No. 1 by the Court?

A. Commercial banking, commercial business.

Q. No. 2, what business is conducted or was at the time of the institution of this action?

A. Savings bank department, personal loan department, commercial credit department, and they have a family lobby there showing different kitchen appliances.

Q. I show you Plaintiff's Exhibit 19.

A. One minute. I am not finished.

By the Court:

Q. Go ahead, finish.

A. Then in that same building——

Q. No. 2?

A. No. 2 building they take mortgage payments and deposits for the special checking accounts.

[fol. 63] By Mr. Rollins:

Q. Are the safe deposit vaults in that building, too?

A. Stairs leading to the safe deposit vaults.

Q. Building No. 2?

A. Building No. 2.

Q. I show you Exhibit 19 and ask you to state to the Court exactly what does that represent?

A. This is a picture of the interior of building No. 1 showing the commercial banking department.

Q. That is No. 1. That is used exclusively for commercial business?

A. Main floor, yes.

Q. I show you Exhibit 20 and ask you to tell the Court exactly what that represents.

A. This picture represents the entrance from the com-

commercial banking department into the savings bank department, walk in from the commercial department into the savings bank department.

Q. That is a connecting archway between buildings 1 and shown on Exhibit 18?

Mr. Grimes: I object to the form of the question, leading the witness.

The Court: Sustained. It is leading.

Q. With what does that connect?

A. It connects No. 1 and No. 2.

By the Court:

Q. When you are speaking of a door, archway, will you point out what you have in mind?

A. (Indicating).

The Court: I will put an arrow over what the witness just pointed to. That is it, is it not?

The Witness: Yes.

[fol. 64] By Mr. Rollins:

Q. Who is the person in that photograph?

The Court: Does it make any difference?

Mr. Rollins: It is he.

The Court: They are not raising any question whether he was there or not.

The Witness: Right there.

Q. I show you Exhibit 21 and ask you what that photograph represents?

A. This is a picture of the savings department showing teller's windows and also showing glass sign with the word savings.

Q. How many of those tellers' windows bearing the sign savings, are there?

A. Six. There are six windows.

Q. That was the condition that prevailed in April, 1950 when you visited the premises?

A. Yes.

The Court: You do not have to ask that question. That is an over-all question.

Q. I show you Exhibit 22 and ask you to inform the Court what that represents.

A. This is a picture of the opposite side of the building No. 2, showing windows where the bank takes in those special checking accounts and mortgage payments. It also shows depositors' counter in the center which contains deposit tickets and withdrawal tickets for savings accounts and special checking accounts. It also shows part of the circular counter in the center where new accounts are opened.

[fol. 65] Q. I show you Exhibit 23 in evidence and ask you what that represents.

A. This is a picture of the counter itself in the center that they use to open new accounts and other bank business. They open savings accounts at this counter.

Q. Is there a sign saying new accounts?

A. There is a sign saying, new accounts.

Q. I show you Exhibit 24 in evidence. Will you tell the Court exactly what that represents?

A. This is a picture of the consumer credit department and also another picture of the counter where new accounts are opened, and this picture also shows the stairs going down to the safe deposit section.

Q. I show you Exhibit 25 in evidence and ask you what that represents.

A. This is another picture of the savings bank department showing the new accounts counter looking out toward Hempstead Turnpike, showing the door and the windows, door where depositors come in and out, and also shows the door connecting building No. 1 and No. 2.

Q. I show you Exhibit 26 in evidence and ask you what that represents.

A. This is another picture showing the consumer credit department and stairs to the safe deposit vaults, and part of the new accounts counter.

Q. What building?

A. In building No. 2.

Q. I show you Exhibit 27 and ask you what that represents?

A. This is a picture of the archway between building No. 1 and building No. 2. It also shows a picture of a door going out toward Hempstead Turnpike.

Q. What building?

A. Building No. 2.

[fol. 66] Q. Does that door, Exhibit 27, lead on to the street?

A. It does.

Q. Is this another view, Plaintiff's Exhibit 28, of building No. 2?

A. This is a picture taken upstairs, showing the main floor of building No. 2, showing depositors' counters and the door and it is part of the teller's windows where they take mortgage payments. It also shows connecting door between building No. 1 and building No. 2.

Q. I show you Plaintiff's Exhibit 29 and ask you what that represents.

A. This represents deposit ticket of the Franklin National Bank, showing the words, savings department, and the other side, represents special checking deposit ticket of Franklin National Bank. This was picked up on the counter of building No. 2 the date the photographs were taken, December 18, 1950.

Q. From where did you take these tickets or these withdrawal slips and make photographs thereof?

A. From one of the depositors' counters. Photographs were taken at the time we took a picture of the bank.

Q. Were these deposit counters open to the public?

A. They were.

Q. Did they use it to make deposits and withdrawals?

A. That is right, they did.

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Recess to 2 P. M.

ARTHUR R. SEATON, SR., recalled, testified further as follows:

Direct examination.

By Mr. Rollins (Continuing):

Q. I show you Exhibit 30 and ask you to please inform the Court?

A. This is a picture of the family lobby showing different exhibits.

Q. When you say, family lobby, you mean building No. 2, where savings accounts are maintained?

A. Yes.

Q. That was a savings department maintained by the bank?

A. (No answer.)

The Court: Building No. 2. Stop there.

Q. This is an exhibit of the same kind, commercial exhibit?

A. I believe so.

Q. Containing the objects, of course, there as shown?

A. Yes, that is right.

Q. I show you Exhibit 31 and ask you what that represents?

A. This is another portion of the family lobby in building No. 2, showing various exhibits.

Q. I show you Exhibit 32 and ask you what that reflects?

A. This is a photostat copy of the withdrawal slip of the Franklin National Bank showing the word, savings, pass-book also a blotter, photostat copy of a blotter on which they say save regularly for rainy days, and also states, we pay two percent on balances from \$100 to \$1,000, and one and a half percent on balances above \$1,000, no limit on deposits or withdrawals.

Q. Where was this found when it was photographed?

[fol. 68] A. On the deposit desk in building No. 2.

Q. Building No. 2 wherein the savings department of the defendant is or was maintained, you say they have these counters?

A. That is right.

Q. Those are used by depositors, normally used by depositors in any kind of savings bank?

A. That is right, yes.

Q. Do they have a compartment——

Mr. Grimes: I object to the form of the question and move the question and answer be stricken out as leading.

The Court: Yes.

Q. Describe to the Court exactly——

The Court: Has not he already done that? They are counters.

Mr. Rollins: I want to show counters where——

The Court: They are counters he has said before which depositors use to make out their deposit slips and carry on any other clerical work of their own they want to do. Probably pen, ink and forms.

Mr. Grimes: The testimony is the Franklin National Bank.

The Court: That is correct.

The Witness: That is right, yes.

Mr. Grimes: Motion to strike, leading question?

The Court: Yes, that is out. Is there any objection to the Court sort of——

Mr. Grimes: I have no objection to anything at all this Court does.

[fol. 69] The Court: We can leave that subject about that equipment. I think it is in the record now.

By Mr. Rollins:

Q. Did I understand you to say building 1 and 2 as shown in Exhibit 18 have separate entrances and exits leading on to the street?

A. That is right.

The Court: Yes, he said that.

Mr. Grimes: May I ask him what he means by separate entrances and exits?

The Court: Maybe you can agree on that and save cross examination. I think that is a good idea. Let the witness answer the question.

Mr. Grimes: In the absence of a question may—I am going

to object to it. I am going to move it be stricken in its present form.

Mr. Rollins: May I have the stenographer read the question back?

The Court: There is not any question. Mr. Grimes wants you to describe what you consider two exits and two entrances that open on the street.

The Witness: On building No. 1——

The Court: Is there an objection to the question?

Mr. Grimes: If this is a question intended to replace the previous question and answer, then I have no objection. If it is not then, I object to the previous question as leading and misleading.

[fol. 70] The Court: I sustain that objection. It was leading. The witness was there, so we can have the witness describe what he said were those two entrances. Go ahead.

The Witness: There is an entrance in building No. 1, and there is a separate entrance on building No. 2 where people can go in and out of the buildings without going through, crossing over to building 1 or 2.

By Mr. Rollins:

Q. Are these entrances and exits which you have mentioned, do they lead on to the street?

A. They do.

Q. To and from the street?

A. To and from the street.

The Court: Not only that, but the same street, he said.

Q. Same street, is that right?

A. That is right.

Mr. Grimes: There is an exit, I gather.

The Witness: Exit, yes.

The Court: I think you have that fully developed in your record.

By Mr. Rollins:

Q. Have you in the course of your duties during many years you have been associated with the State of New York, visited savings banks?

A. I have.

Q. Can you state with a reasonable degree of certainty [fol. 71] whether or not the savings department maintained by the defendant in building No. 2 as reflected in Exhibits 18-32 inclusive, has the appearance of a savings bank?

Mr. Grimes: Objection.

The Court: I would have to sustain that objection. That is merely the conclusion of the witness.

Mr. Rollins: As an opinion.

The Court: That would not be an opinion. That is a conclusion. First, you would have to establish the fact all savings banks had some sort of standard way of being laid out, and that this was contrary to that. We will strike out the last statement provoked by the Court. I fully understand it. I know what your objective is, and I was trying to give you my method of analyzing your question. I do not think the witness can state the conclusion whether in his opinion this particular bank's method of carrying on its business is different from or the same as any other bank he visited.

Mr. Rollins: Just physical appearance.

The Court: We could not do it without having a base to operate from. No witness can testify to something in his mind.

Mr. Rollins: Your Honor has a right to assume from a state of facts there is, in addition to the fact your Honor has a right to take notice how a bank does business, and how it appears. It is a matter of common knowledge.

The Court: I do not want you to rely too heavily on that. [fol. 72] You may see the significance of this building construction. I do not. I do not consider at this stage of the trial it is of great importance how one banker builds a building, but I am still keeping in mind the gravamen of your charge and that is, that savings accounts in this particular bank was emphasized. That is your point.

Mr. Rollins: That is right.

The Court: I am going to allow you to develop that but you will have to do it within the rules of evidence.

By Mr. Rollins:

Q. How many commercial banks have you visited in your career, different ones?

A. Perhaps about three or four thousand.

Q. That is continuously to the present date?

A. Yes.

Q. In your own experience have you ever seen in a commercial bank any tellers' windows with the legend, "Savings"?

A. Never.

Mr. Grimes: I object to the form of the question. I think there are several questions involved, if I understand it.

The Court: I think I will allow that question. The question is, in all of his examinations and inspections of three or four thousand banks did he ever see a teller's window with the word "savings" on it. I will allow him to answer that.

Mr. Grimes: I do not believe that was the question.

[fol. 73] The Court: Is that the question?

Mr. Rollins: Yes.

Mr. Grimes: I do not object to that.

The Court: We will substitute that for the one you thought you understood. That is what counsel is driving at. What is the answer?

The Witness: No.

Q. How many savings banks did you visit in your official capacity during your career and association with the Banking Department of the State of New York?

A. About the same amount, more or less, three or four thousand. That is repeated visits, you know.

By the Court:

Q. Different banks we mean in each instance? I was wondering about three or four thousand.

A. You visit a bank once a year.

Q. How many different banks? We are talking about the structure of the building now. How many different commercial banks? We will let you correct that if you want to.

A. Well, maybe a thousand different ones.

Q. So you change that three or four thousand to one thousand?

A. Three or four thousand would cover every institution.

Q. Just commercial, do you want to change that to one thousand? Mr. Rollins asked you about savings banks. How many different savings banks have you visited, inspected?

A. About a hundred, I would say.

[fol. 74] By Mr. Rollins:

Q. Did you ever see any of those savings banks have a teller's window without the words "savings" on it?

A. No.

Q. Is there anything about the physical make-up of a savings bank in contrast to a commercial bank?

A. Yes, there is, in the commercial.

The Court: You have to base that question on something. That is an expert question. You will have to give him a hypothesis of some kind. We do not want his—

By Mr. Rollins:

Q. Assuming that the physical conditions as reflected by Plaintiff's Exhibit 21—

The Court: He can assume conditions he saw at the defendant's bank.

Q. Assume the conditions that you saw at the defendant's bank in Franklin Square, Nassau County, State of New York, as reflected by Exhibits 18-32 inclusive, can you say with a reasonable degree of certainty whether it gives the appearance of the ordinary, common savings bank, modern savings bank?

Mr. Grimes: Objected to.

The Court: I must sustain the objection.

Mr. Rollins: May I ask why?

The Court: Yes. There is not enough in the question, and I do not think you have established there is any standard.

[fol. 75] Mr. Rollins: There cannot be any.

Q. Is there any particular standard that differentiates a savings from a commercial bank?

A. Yes, there is.

By the Court:

Q. Construction of the building, we are talking about.

A. No.

Mr. Rollins: Other than the signs "savings".

The Court: Any signs? We are not talking now about signs. We are talking about construction of the building, so his answer is no, there is not any distinguishing feature.

By Mr. Rollins:

Q. Does the fact that a bank has on its tellers' windows the words or legend "savings" distinguish that kind of a bank from a commercial bank?

Mr. Grimes: Objected to.

The Court: I would have to sustain the objection to that.

Q. Can you state with a reasonable degree of certainty from your experience as you state, in visiting a hundred savings banks approximately whether the defendant bank, because it had the legend "savings" or saving above its tellers' windows as reflected in exhibit 18, creates the impression that it is a savings bank?

[fol. 76] Mr. Grimes: Objection.

The Court: That is what the court will have to decide. I will have to sustain the objection. Do you mind if I make this suggestion? You have asked the witness to compare the structure. Could this witness not give his opinion with respect to some particular feature of the interior of all savings banks he has been to. Put it this way. Is there any distinguishing feature with respect to the interior of all the savings banks that you have visited, anything stands out?

The Witness: Yes, there is.

The Court: Do you want him to answer that?

Mr. Rollins: Yes.

The Witness: You will find the word "savings" in advertisements throughout the building.

Mr. Grimes: I move the answer be stricken out, not responsive to the Court's question.

The Court: I will have to sustain it. Advertising would not be interior.

The Witness: They have signs with the word "savings" and they describe what percentage of dividend they will pay.

By the Court:

Q. That is not a sign?

A. Yes, that is a sign, and they also—deposits, withdrawals are not permitted without passbook being presented at window in the savings bank.

[fol. 77] Mr. Grimes: I object to that and I ask it be stricken out.

By the Court:

Q. Is that a sign?

A. Yes, that is a sign.

Q. In each savings bank?

A. Yes, that is right.

The Court: I will have to let it stand, if it is a sign.

By Mr. Rollins:

Q. Can you now state whether the signs in this particular bank, defendant bank, Franklin Square, is reflected in exhibits 18-32 because the signs in comparison with the other banks that you visited gives the impression to the public it is a savings bank?

Mr. Grimes: Objected to.

The Court: I will have to sustain that. That is where the conclusion comes in.

Mr. Rollins: I asked in his opinion about it as it appears to him.

The Court: The witness could answer if the interior of the defendant bank was, upon his inspection, similar to or dissimilar to other savings banks he visited. He is qualified to answer that, but there is not any conclusion there. He is stating a fact.

By Mr. Rollins:

Q. Can you state whether or not the defendant bank, that is, the defendant savings department in building No. 2

compares as a savings bank in its physical appearance to other savings banks?

[fol. 78] Mr. Grimes: Objected to.

The Court: Yes. I would have to sustain the objection too. I think you can get a better word than compares, to begin with, and I see there is another objection.

Mr. Grimes: Savings department for one thing, unless it is specified what he means. I object on that ground, also.

The Court: Yes. Better divide that question, because there will be no objection to your concentrating on what you call building No. 2, whereas there probably would be no objection if you take the whole building for your first question. Then your second question, if they want to object to that, I will rule on it, but I think if you use the word, instead of compare, similar to, you may get over it better.

Mr. Rollins: Is it building 2 and the operation of its business there, is that objectionable?

The Court: You are going to get an objection. Go ahead, ask your question.

Mr. Rollins: Withdrawn.

Q. In your opinion, is the defendant's building No. 2 similar to those other hundred savings banks that you have visited?

Mr. Grimes: Objected to.

The Court: With respect to equipment or interior of the building?

Q. With respect to its equipment or interior of the building?

A. Yes.

[fol. 79] The Court: There is objection to that on the ground it is just dividing this up into building No. 2, which you contend is only part of the bank, is that right?

Mr. Grimes: I would like to hear the answer he gave to that. May I have the question and answer repeated? I move the question and answer be stricken.

The Court: I think I have to strike out the question and answer. You can adduce that proof, but counsel is technically right on that question.

Mr. Rollins: I withdraw it and leave it to your Honor,

because your Honor has the right to take notice as to the condition of other banks and if you wish, I will get the citation for your Honor.

The Court: I will ask him this question. With respect to the hundreds approximately, savings banks which you have inspected and visited, treating exclusively with the interior will you say that the defendant bank is similar to those savings banks? Do not answer for a moment.

Mr. Grimes: No objection.

The Witness: Yes.

The Court: You have that question for the whole building. He says yes, there is some similitude.

Mr. Grimes: I understood he said they were similar.

The Court: Yes, they are similar. That is right. No qualification.

Q. With respect to the method of doing business with this defendant bank, and with regard to their savings department [fol. 80] ment, can you express an opinion whether they are the same as those other hundred savings banks?

Mr. Grimes: Objection.

The Court: I will have to sustain the objection with respect to doing business. We have not had any evidence at all of doing business yet.

Mr. Rollins: I will leave the situation as it is right now. I feel there is enough to decide the question. May I call your Honor's attention at this time inasmuch as the bill of particulars mentions there are six separate tellers' windows with the word "savings" on it, exhibit 21, distinctly shows on this photograph. I know your Honor noticed that.

The Court: Oh, yes, I saw this one. Yes, I noticed it.

By Mr. Rollins:

Q. This action was instituted by direction of the Superintendent of Banks after you made a report to him?

A. That is correct.

Q. Direction was given to the Attorney General?

A. That is correct.

Mr. Rollins: You may inquire.

Cross-examination.

By Mr. Grimes:

Q. You have been in the Department of Banking for some twenty-five years, have you?

A. Yes.

Q. At one time I believe you said you occupied the position of Special Deputy Superintendent of Banks, is that correct?

A. That is correct.

Q. Prior to going into the Banking Department did you make any special study of banking?

A. I did.

Q. Passed a Civil Service examination?

A. Yes.

Q. For the past twenty-five years, if that is the period of time, you have had no other occupation?

A. That is correct.

Q. You devoted your entire time to banking?

A. That is correct.

Q. Is your jurisdiction state-wide?

A. Yes.

Q. You have visited banks all over New York State, is that correct?

A. Yes, and Long Island.

Q. Beg pardon?

A. Long Island, too.

Q. Including Long Island?

A. Yes.

Q. Has it been your practice in line with your duties to follow the procedures of others doing business?

A. Yes, he said in general, I think.

Q. In general?

A. Yes.

Q. In New York, of course, we have State commercial banks, do we not?

A. We do, yes.

Q. About how many of those are there? I am not asking an exact figure but a rough approximation.

A. I would say between three hundred and five hundred throughout the State.

Q. Three hundred to five hundred; and we have savings banks chartered by the State, is that correct?

A. We have, yes.

Q. And we have savings and loan associations chartered by the State?

A. Yes.

Q. About how many savings banks do we have in New York State?

[fol. 82] Mr. Rollins: I should like to say for the record, it is not proper cross examination.

The Court: Allowed.

The Witness: I would say approximately twelve hundred. I am not sure. These are all approximate figures I am giving you.

Q. How many State chartered savings and loan associations, approximately?

A. About a hundred.

Q. In New York State there are National banks, are there not?

A. Yes.

Q. Do they come under your jurisdiction in any way?

A. Except if they have a safe deposit corporation within the bank we examine the safe deposit corporation.

Q. Do you make those examinations?

A. Yes.

Q. So you are generally familiar with National banks in the State of New York?

A. As far as safe deposit boxes are concerned, yes.

Q. Which of the banks enumerated have the power to accept deposits from such depositors or people, to earn interest?

A. Commercial banks, savings banks and savings and loan associations.

Q. Would you say, sir, that these banks are in competition with each other for deposits of money, people who have money, on which they wish to make deposits and obtain interest?

A. I would say yes. You mean commercial banks and savings banks.

Q. All types of banks.

A. Yes.

Q. Do not they all compete with each other for people's money?

A. That is right.

Q. That is how they get money to loan and make money?

A. That is correct.

[fol. 83] Q. You say you would say, so you do not have any doubt about it?

A. No, I do not.

Q. Competition between these various types of banks is very keen?

A. It is.

Q. They go out rather aggressively for deposits?

A. That is correct.

Q. In support of that they all advertise?

A. Yes, they do.

Q. They advertise quite extensively?

A. Yes.

Q. No doubt about that?

A. No doubt about that at all.

Q. In the course of your duties do you follow the various types of ads. used by these various types of banks that do business in the State of New York?

A. No.

Q. You do not?

A. No.

Q. Do you see them in the daily newspapers?

A. Yes, if I am reading the daily paper I will look at them, if they are there.

Q. You do read the daily papers?

A. Yes, I think so.

Q. You think you read the daily paper?

A. I think so, yes. I read the daily paper.

Q. No doubt about it?

A. No doubt about it.

Q. You see advertisements in the daily paper?

A. That is right.

Q. You see ads. of savings banks?

A. Yes.

Q. National Banks?

A. Yes.

Q. You see that type of advertising daily in which they advertise for deposits, is that not correct?

A. Yes, that is correct.

Q. Some banks advertise under different names for accounts on which they pay interest?

A. That is correct.

Q. Some National banks do, do they not?

[fol. 84] Mr. Rollins: That is objected to, what other banks do. We are not trying all banks. We are only trying this bank.

The Court: I will allow it.

The Witness: Yes.

Q. In fact, most National banks do, do they not?

A. I suppose so. I cannot answer that unqualifiedly because I don't know what other banks do throughout the State.

Q. You have seen a number of ads. by National banks?

A. Yes. Whether all National banks do it or not, I don't know.

Q. In those ads. which you have seen in daily papers when the National banks advertise for deposits of people and offer to pay interest, what are the terms they use?

A. Special interest deposits or thrift account.

Q. Compound interest account?

A. Once in awhile. It is an old fashioned type.

Q. Thrift account, special interest account and compound interest account, is that correct?

A. That is correct.

Q. In your observation compound interest account is a phrase used less than others?

A. That is correct.

Q. Which phrase is most often used in your observation?

A. Special interest account.

Q. Thrift account?

A. Comes next.

Q. Comes next most used?

A. That is correct.

Q. When a savings bank advertises what words do they use?

A. Savings account and—

Q. And savings and loan associations?

A. Savings accounts.

Q. Leaving out savings and loan associations advertising, [fol. 85] and considering savings banks advertising, they pay interest at a certain rate on deposits?

A. That is correct. They call it dividends.

Q. National banks of the type you have mentioned offer the same service, do they not?

A. Yes.

Q. In other words, they ask people to deposit money there and they offer to pay interest, is that correct?

A. That is correct.

Q. State commercial banks do the same thing?

A. Yes.

Q. Is it your view that these various phrases used, such as savings or compound interest, thrift, special interest all mean the same thing?

A. They do, yes.

Q. Is it your view they all have equal value for advertising purposes?

Mr. Rollins: That is objected to. Highly speculative.

The Court: This is cross examination. He has a right to ask.

Mr. Rollins: May I submit to the Court there is only one. Did they violate the law? What he thinks is immaterial. The law is definite.

The Court: I think you will have to be corrected in that attitude. This is not rigidly defined violation. You charge here similitude, the holding out of this bank as a savings bank when in fact it is not. That opens the door to a very wide field of proof on the part of the defense, so it is not really restricted to whether or not they have a right to use [fol. 86] the word "savings". That may be a question of law, but this other, which is surely in your case, is a question of fact. He is qualified here as an expert, and I assume he is an expert, and you have charged advertising by the bank. I think counsel has a right to show what other banks do, whether it is effective and all the surrounding circumstances. That is one of the elements, is it not?

Mr. Rollins: It has the physical aspect of conducting itself as a savings bank.

The Court: You have put in evidence all exhibits showing two percent, payable and word "savings", so on. I am only devoting a little time to this to indicate to you the field is broader than you think, and that is the reason for my ruling. Go ahead.

The Witness: It is.

Q. In other words, each of these four words, savings account, thrift account, special interest account and compound interest account is in your opinion the equivalent of any other?

A. Yes.

Q. You are sure of it?

A. Yes.

Q. No doubt about that in your mind?

A. No.

Q. In other words, thrift account is the equivalent of savings account?

A. That is correct.

Q. Compound interest account is the equivalent of savings account?

A. That is right.

Q. Special interest account is the equivalent of savings account, is that correct?

A. That is right, that is correct. Yes.

Q. You were directed to make this investigation, am I correct?

A. Yes, that is correct.

[fol. 87] Q. By the State Superintendent of Banks?

A. That is right.

Q. Your investigation was under some section of the Banking Law of the State of New York?

A. That is right.

Q. What section was that?

A. 258, sub-division 1.

Q. What section was that?

A. 258, sub-division 1.

Q. What does the first part of that sub-division prohibit?

The Court: Is not that a question of law?

Mr. Grimes: It is a mixed question of law and fact.

The Court: If you want to press it, but it opens the door to the plaintiff to have this witness explain the statute.

Mr. Grimes: I am fully aware of that.

Q. That prohibits a National bank, among others, does it not, from using the word, savings or saving, or their equivalent?

A. That is correct.

Q. That is right in the statute, as a matter of fact, and you have read the statute?

A. That is right.

Q. That has always been your understanding?

A. Yes.

Q. You have just testified that these other three phrases thrift, compound interest and special interest account, are the equivalent of savings account?

A. Yes.

Q. Have you learned in the past year thrift account being advertised for by banks?

[fol. 88] A. Not off-hand, no. I cannot mention any names of banks now. I have seen them.

Q. I am going to ask the question with respect to compound interest accounts.

A. The same thing applies.

By the Court: .

Q. You cannot give names?

A. No.

Q. But you would say banks have done it in the past year?

A. Yes.

Q. The same question as to special interest accounts?

A. (No answer).

By Mr. Grimes:

Q. The question was, can you name any bank which has advertised in the past year, using the words, thrift account?

A. I said no, I could not name.

By the Court:

Q. You said you knew banks did it? Your answer would be the same with respect to compound interest and special accounts, too?

A. Yes.

By Mr. Grimes:

Q. You know a number of banks have used those terms in the past year in the State of New York, is that correct?

A. Yes, that is correct.

Q. Are you familiar with the prosecution of a law suit brought by the State Banking Department, or by the Attorney General, in behalf of the State Banking Department, for a violation of Section 258, sub-division 1?

Mr. Rollins: Objected to, if the Court please.

The Court: I think I will allow it. I will take that evidence, there have been a number of prosecutions because I assume the question is going to be answered, and will be in the negative to show the attitude of the State with respect to the statute over whatever period of years it has been on the statute books.

Mr. Rollins: May I say there is no estoppel against the State of New York. Whether the State enforces or does not enforce it does not excuse another in committing an offense.

Mr. Rollins: Does your Honor rule Section 258 is subject to interpretation, and there is ambiguity?

The Court: I will not add the latter part, but I will say certainly it is the subject of interpretation. That is why you are here. Your department has interpreted it that the defendant has violated it.

Mr. Rollins: May I say for the purpose of the record Section 258 in my opinion is unambiguous, and has been ruled on, and construed by the Court of Appeals, the Court of Last Resort. There is no ambiguity in this case, no matter what any other department says or does on the subject, to me is of no legal consequence, certainly no aid in the interpretation of the statute, because it does not need any.

[fol. 90] The Court: I will record your objection, but I will allow the answer. Just answer the question.

The Witness: Will you repeat the question, please? I am not familiar, no.

Q. You hear about prosecutions, whether in civil or criminal forums, do you not, in the performance of your duties as a skilled bank examiner?

Mr. Rollins: I object.

The Court: I will allow this.

The Witness: No. We never talk about it ourselves, and the only time we ever look and see, check on other law suits, if we have a case such as this case here and the attorney does all that, checks back. I have never done it, noted how to do it.

Q. How many State bank examiners are there?

A. One hundred and ten.

Q. You do not talk among yourselves at all?

A. Not about law suits. We talk general banking business.

Q. Let me ask you this. Can you name any single prosecution, civil, or criminal, of any bank in the State of New York for using the words thrift account in the past twenty years?

A. No, I cannot answer that because I don't know.

Q. You cannot name any?

A. No, because I don't know.

Q. I ask you the same question with respect to the use of the words, special interest account, can you name a single prosecution civil or criminal of any bank for the use of that phrase?

[fol. 91] Mr. Rollins: May I submit the use of those phrases is not prohibited by statute of New York.

The Court: According to the development of the cross examination the witness has testified those three expressions are the equivalent of saving and savings.

Mr. Rollins: By National banks.

The Court: And counsel is developing that point.

Mr. Rollins: He is trying to find out if banks use that term there is no violation of the law, if one does use it.

Mr. Grimes: I do suggest I have a right to examine this witness, especially in view of the fact he is qualified on these very subjects.

The Court: I have overruled the objection, but I want counsel's reasons noted.

Q. I ask you the same question with respect to compound interest.

A. I don't know, no sir.

Q. That is not responsive to my question. My question is, can you name a single prosecution, civil or criminal, brought by the Banking Department, or in behalf of the State of New York, against any bank in the State of New York in the past twenty years for the use of the words thrift account, special interest account or compound interest account? Can you name one?

A. No, I cannot, no.

Q. You cannot, can you?

A. No, I said.

Q. Do you know of any prosecution that is in progress at the present time or in the course of preparation for the use of any of those three words?

[fol. 92] A. With the exception of this case here, I do not.

Q. The only one you know of?

A. That is right.

Q. You have been to the defendant bank on a number of occasions?

A. That is correct.

Q. You testified on direct examination you were there on April 6, 7, 10 and 11 of 1950 and September 18 of that year, is that correct?

A. That is correct, yes.

Q. As you approached the bank you approached it from the Hempstead Avenue side, is that correct?

A. That is correct, yes.

What is the first thing you observed when you approached the bank? Let me ask you this, as you approached the bank did you see any sign stating what any of the buildings, purporting to state what the bank was, and in asking that question I ask you to look over Plaintiff's Exhibit 18.

A. It has a sign, Franklin National Bank, on it.

Q. It has a sign, Franklin National Bank, on it?

A. That is right.

Q. Did that convey any meaning to you?

A. Yes.

Q. What meaning?

A. National Bank, under the jurisdiction of the Federal Government.

Q. Did that suggest to you in any way it was a savings bank chartered by the State of New York?

A. No, it did not.

Q. The two are inconsistent with each other? That is to say, one is a Federally chartered corporation, and the other is a State chartered corporation?

A. That is correct, yes.

Q. As you approached the building were you deceived in any way by the appearance?

A. No.

[fol. 93] Q. Perfectly clear to you?

A. That it was a National bank.

Q. That it was a National bank?

A. Yes.

Q. Did that look to you like one building, two buildings, or three?

A. Looked like two buildings.

Q. Look a little further and see if you can see what might be a third building.

The Court: You do not want him to look at the picture and tell us? You want him to tell what he saw when he was there.

Mr. Grimes: Look at the picture to see if it refreshes his recollection as to what he did see.

The Witness: I see two buildings here, I see an extension to the main buildings, an extension, I will put it that way, but to my mind it is two buildings and one building, the first building with the Franklin Bank sign on is the original building and the other building was built sometime after.

Q. Does building No. 2 look to you something like a department store from the outside?

A. No, I would not say that.

Q. Do you see any evidence there might be space for displays of any sort in that building?

A. No.

Q. You note the facade, face of the building is partly of glass, that is correct?

A. That is correct.

Q. It has revolving doors?

A. That is correct.

Q. On the occasion on which you visited that building you made a thorough investigation, did you?

A. Of the main floor building 1 and 2.

[fol. 94] Q. Did you yourself gain the impression that the Franklin National Bank is in fact a savings bank? You, yourself?

A. No.

Q. Did not fool you in any way?

A. No, did not fool me in any way.

Q. You knew it was a National Bank?

A. That is right.

Q. You filed an affidavit in this case, did you not, in connection with an application to the Supreme Court, New York County, for an injunction pendente lite against the defendant?

A. Yes.

Q. Can you name a single person in the entire State of New York or in the entire world who has been deceived into thinking the Franklin National Bank is in fact a savings bank, quoting the name?

A. I cannot name anybody, no.

Q. Can you give one name?

A. No.

Q. Not one? About how many people are there in the State of New York?

A. I don't know.

Q. Whatever the number is—you know there are millions?

A. Yes.

Q. You cannot give the name of one person who has ever been deceived into thinking the Franklin National Bank was a savings bank, can you?

A. No.

Q. You filed a report?

A. That is correct.

Q. You filed an affidavit?

A. Yes.

Q. On the basis of that you realize the Attorney General filed a bill of particulars in this case?

A. That is right.

Q. Charging the Franklin National Bank with having committed fraud, don't you?

A. Yes.

Q. Was there any other report filed by anybody with the State Banking Department in this matter?

A. No.

[fol. 95] Q. And yours is the only one?

A. Mine is the only report.

Q. Was the bill of particulars wrong on the basis of your report, then?

A. It was, yes.

Q. The only thing you had to go by?

A. The only thing I had to go by.

Q. You realize the bill of particulars also charged a deliberate deception on the part of the Franklin National Bank?

Mr. Rollins: While I make no apology for what is in the bill of particulars, I feel I took the course as stated by law. I contend, as a matter of law, it does constitute fraud. The witness had nothing to do with the preparation of the pleadings in the case as you know, and this statement, I don't know what it could serve, except to throw a smoke screen in this case as I feel it does.

The Court: I would not get so excited about it. Counsel would be derelict in his duty if he did not search for his motives. Counsel is seeking for motives.

Mr. Rollins: This is not an issue in this case.

The Court: I know you say that in your brief, yet counsel would have a right to show interest and motive of the witness on the stand giving factual testimony, and that is all he is doing. Answer the question.

The Witness: Repeat the question.

[fol. 96] By the Court:

Q. The question was, did you know the bill of particulars states in it that there was deliberate fraud practiced by the defendant bank in holding itself out as a savings bank when it is a National bank?

A. That is right.

Q. You knew that?

A. I knew that, yes.

By Mr. Grimes:

Q. You give the same answer to the same question with reference to the charge in the bill of particulars that there was deliberate deception of the public by the defendant bank?

Mr. Rollins: I object. The bill of particulars was verified by me, assistant Attorney General of the State.

The Court: I will allow his question.

The Witness: I give the same answer, yes.

Q. It also charges that the Franklin Bank usurped the rights of other people, savings banks and loan associations; you realize that?

A. I do.

Q. Further, we have committed a public nuisance; you know that charge is in the bill of particulars?

A. Yes.

Q. That is all based on your report, is that not right?

A. That is right.

Q. Yet you cannot name a single person who was deceived?

A. That is correct.

Q. Therefore, I take it you have not produced any other witnesses in court who will testify, or could possibly testify [fol. 97] they have been deceived in any way by the bank?

A. I did not try to find anyone, I don't know, I could not answer that question, personally, as an individual, don't know anybody.

Q. Let me say, you were not deceived and you do not know anyone else who was deceived, is that correct?

A. That is right.

Q. You say you visited upwards of a hundred savings banks in the course of your career of twenty-five years?

A. That is right.

Q. How many savings banks have you seen that had airplanes in the lobby?

A. I have not seen any with airplanes in the lobby.

Q. Automobiles in the lobby?

A. Have not seen any. Dime Savings Bank of Brooklyn.

Q. A kitchen used for a display?

A. They have a display.

Q. When did you see that?

A. Of complete kitchen equipment, oil burners and everything to encourage.

Q. When did you see that?

A. December this year, 1950.

Q. Did you ever see one before December, this year in the Dime Savings Bank?

A. Oh, yes, yes.

Q. When did they start doing display type of work?

A. That I don't know.

Q. You don't know whether it was before or after the Franklin National Bank began to do it?

A. I imagine it was before the Franklin ever did it because the Dime Savings is older than the Franklin National Bank.

Q. You don't know?

A. No, don't know.

Q. You don't know it at all, do you?

A. No.

Q. Did you report to the State Banking Department that there was only one function performed in building No. 2?

A. No, I did not.

[fol. 98] Mr. Grimes: May I have that report.

The Court: The Clerk has it. It is in evidence.

Q. Have you recently read the affidavit you filed in this case on the application for an injunction pendente lite?

A. No, I have not read it since I signed it.

Mr. Grimes: Is that among the Court's papers? I would like to show it to the witness.

The Court: That is in the application. I do not know whether it is here.

Q. You recognize on this document which reads, sworn to before me this 12th day of May, 1950, your own signature, do you not?

A. That is correct, that is my signature.

Q. Will you please look over the document of which that is part and see if you recall that document?

A. Yes, I recall it.

Mr. Grimes: May the record show I am referring to, and the witness is referring to an affidavit signed by Mr. Seaton

filed May 12, 1950, filed in this proceeding in connection with an application for an injunction pendente lite.

The Court: That is consented to, is it not, that this affidavit is part of your application for a temporary injunction? Yes, that is consented to.

Q. You recall signing that, don't you?

A. I do, yes.

[fol. 99] Q. Will you please just look it over, briefly. Will you please look down at the bottom of the second page starting with the words, by which, do you find that?

A. I do, yes. I wish—page 2?

Q. Did you there make the statement that—you see where you have referred to the phrase, connecting building?

A. Yes.

Q. You see the phrase used exclusively for savings accounts?

A. That is right. I do.

Q. That statement was not entirely accurate, was it? That there is a building used exclusively for savings accounts?

A. Well, I did not say, we explained in this affidavit here that the back—I cannot answer that question your way you put it, answer that question the way you put it.

By the Court:

Q. You cannot answer yes or no, is that what you want to say?

A. I cannot answer the way you put that question.

By Mr. Grimes:

Q. You see the words, contiguous building, do you not?

A. That is right.

Q. I show you Plaintiff's Exhibit 18 and ask you what if any part of that photograph is represented by what you refer to as a contiguous connecting building.

A. Building No. 1 is one building, and the building next to it is the building next to it, building No. 2.

Q. In your affidavit which of those two did you mean by contiguous connecting building?

A. Middle building, put it that way.

[fol. 100] Q. Which one is that number?

A. No. 2.

Q. Building No. 2, do you say the reference there in your affidavit in that statement that building is used exclusively for savings?

A. I say that part in here, yes.

Q. You said that building was used **exclusively** for savings, did you not?

A. No. In another part of the affidavit I say in the back of the savings department.

Q. I am talking about that part of the affidavit.

A. All right. Let me explain the whole business. I am not going to answer the question the way you are putting it, because it is incorrect.

The Court: Do not say what you are not going to do. I am not in any way admonishing you, but your question was, did you say in that affidavit, and if you press that question I think the witness has the right to use any part of the affidavit.

Mr. Grimes: I think that is quite correct.

Q. In that portion of the affidavit to which I have referred, where you have, as you have said, used the phrase contiguous connecting building, did you not then and there say that building is used exclusively for savings?

A. No, I did not.

Q. Please look at the affidavit and see if you do not.

A. It says, it reads that way here, but that is not the intention, the whole building was not used for savings; a certain portion was.

Q. Did you ever go up the second floor of that building? Building No. 2?

A. No.

Q. Did you ever go to the mezzanine floor?

A. Yes.

[fol. 101] Q. Is that portion used for savings?

A. No. That was the directors' room, I believe or directors' table in there.

Q. Has a reference library there?

A. I don't know.

Q. You were there?

A. I was there, but I don't know whether there is a reference library there.

Q. Have you ever been up on the third floor?

A. No.

Q. In your investigation did you ever go to the third floor?

A. No.

Q. You do not know what is up there?

A. No.

Q. Whether it is a mortgage department or otherwise?

A. That is right, don't know what is up there at all.

Q. You were present at the examination of Mr. Roth before trial?

A. Yes, that is right.

Q. That took place on the mezzanine floor?

A. That is right.

Q. You heard him testify to some twenty-one banking functions that took place on the ground floor of the family lobby, did you not?

A. That is correct, yes.

Q. You had occasion to check up on those right then and there, did you not?

A. No.

Q. To see whether there were those functions there?

A. No. I did not check on it.

Q. You had an opportunity?

A. I had an opportunity, yes, but it was not necessary.

Q. You had no reason then to question his statement, there were some twenty-one services performed right on the ground floor?

A. That is right.

Q. The fact of the matter is this savings counter occupies [fol. 102] a very, very small part of the family lobby, is that not true?

A. No, no, I would not say that.

Q. Have you any idea, percentage wise, what it does occupy of the entire family lobby, what percentage of the entire floor space is occupied by the savings counter?

A. I would say half.

Q. Half of the front of the building?

A. (No answer.)

Q. I am talking about the entire ground floor.

A. Ground floor?

Q. That question is clear. You know what I am referring to, the entire ground floor.

The Court: When you say building, do you mean 1 and 2?

Q. I am talking exclusively about what is designated on Exhibit 18 as No. 2, the entire ground floor, what percentage would you say is occupied by the savings counter?

A. I would say the savings counter—you mean where the tellers' windows are?

Q. Precisely.

A. (No answer.)

By the Court:

Q. What portion, percentage wise, counsel wants to know if the space is devoted to savings?

A. I would say half.

By Mr. Grimes:

Q. Half of the entire ground floor area, is that correct?

A. That is correct.

Q. Is it not a fact it is off in a little alcove on the right [fol. 103] hand side as you go in there, the counters are?

A. That is correct.

Q. The other half of that alcove contained, when you were there, a display of storm sashes and other woodwork?

A. In back, that is correct.

Q. Is it not a fact in your affidavit you made reference to a circular counter of some sort?

A. That is right.

Q. Was the counter circular?

A. It has a rounded effect, no, it was not completely round, it had a circular effect.

Q. You reported the fact it had a sign said, new accounts on it?

A. That is right.

Q. Which led inescapably to the conclusion there was a savings bank there, did you not?

A. That is right, I did.

Q. Did you make any inquiry as to what types of new accounts that referred to?

A. No, but I did witness a depositor opening a savings account at that counter.

Q. You saw a depositor open a savings account at that counter?

A. Did.

Q. Did you make inquiry as to whether other types of new accounts could be opened at that counter?

A. No, because I knew there were.

Q. You knew there were what?

A. Other types of accounts being handled there, accounts opened up, special checking account was one I think, application taken for consumer credit loans were taken there, too.

Q. In your affidavit did you make this statement, "the fact there is a large circular counter in the middle of the floor with a sign which reads, new accounts, tends to [fol. 104] support the inescapable conclusion it is a savings bank and operated as *as such*?"

A. That is correct. That is what I said, and that is what I say, and that is what I mean.

Q. Did you intend to convey the impression these signs new accounts, referred only to savings accounts?

A. I meant the sign, new accounts, and the counter itself.

Q. Would you wish to change the statement you made in that affidavit in any way?

A. No.

Q. If you should discover that counter was also used for other types of new accounts?

A. This affidavit is in connection, used with the word, savings and operated as a savings institution, what other business going on at that counter. I know as a bank man all the different services a bank has, every other bank has, that was understood in my mind, and my investigation was for the purpose of finding out whether the bank was using the words, savings, in violation of the Banking Law, which I did.

Q. At that counter you are not prepared to challenge the fact that for a number of years they have used that counter for the purpose of opening different types of accounts and savings accounts, you are not prepared to tell us that?

A. No.

Q. So, as I see it, there was a sign on the counter, which said, new accounts, even though other types of accounts than savings accounts might be opened there, as far as you knew, plus the fact that off to the right there were some counters which had signs saying savings, over them, led you to the conclusion that this bank was operating as a savings bank?

A. That is right. The lobby in front of the savings [fol. 105] bank had depositors' counters; every one of these depositors' counters had deposit and withdrawal slips with the word, savings, on it, so proportionately the whole front of the teller window in that bank was part of the savings department.

Mr. Grimes: I move the Court to make a personal inspection to determine the question that has been raised in this case.

The Court: There is, I understand, no objection to that?

Mr. Rollins: No objection.

The Court: Let it appear of record if the Court finds it advisable it will make the inspection.

Q. Can you name the various types of service that are granted by the bank in the family lobby, various types of service they have there?

A. No, I am not familiar with the various types of service they have there, but I will concede what Mr. Roth said is correct, because I know every bank has that service whether in building No. 1 or building No. 2.

Q. You observed the installment loan department, did you not?

A. I did.

Q. That is a very sizable department?

A. That is right.

Q. Savings banks make loans, installment loans?

A. Yes.

Q. They make installment loans?

A. They make rehabilitation loans, modernizing loans, not the type of loans the Franklin National Bank makes. [fol. 106] Q. The installment loan department of the Franklin National Bank occupies a large part of the ground floor of building No. 2?

A. They occupy the back of the building No. 2 back

part, the front part is occupied by the savings department division.

Q. My question is, it occupies a large part of the floor area of building No. 2, does it not?

A. I would not say a large part, no, it occupies a portion of it, not all of it.

Q. A small part?

A. Yes.

Q. Any savings bank you have ever seen make loans on automobiles?

A. No.

Q. Refrigerators?

A. No.

Q. As you went into the Franklin National Bank in the lobby, you saw types of merchandise on display, did you not?

A. No. As I walked in the bank I did not see that.

Q. After you got in the lobby you looked around?

A. Yes. I walked toward the back and I saw it away from savings department.

Q. In the lobby there came a time you looked over and you saw something to the right which was a savings counter?

A. That is correct.

Q. What right south of the savings counter was there, right to the left of the savings counter? Did you see any merchandise there?

A. Yes, I did, later on after I inspected the front part of the main floor.

Q. Right alongside the savings counter did you not see a display of woodwork, advertising sash and doors facing the savings counter just to the left of it, did you not see—

A. I don't remember at the time of my original investigation. This is in September you are showing us now. [fol. 107] Q. Do you recall any exhibit at that particular time?

A. I saw an exhibit there, yes, over by the elevator, around that section.

Q. Just within a few feet of the left hand as you turn to the right, looking toward the savings counter, there was an exhibition, was there not?

A. Let me see the picture, please.

Q. Take a look at exhibit 30.

A. There is an exhibit there, yes. Here is a picture of it.

Q. That was next to the savings counter?

A. I don't know. I cannot see what is on this side.

Q. You saw a display of Youngstown kitchens shown in exhibit 31, is that correct?

A. That is correct. I saw that.

Q. Did you ever see business like that in a bank before?

A. Yes, in the Dime Savings Bank, Brooklyn.

Q. That is the only one, is that correct?

A. That is correct.

Q. You are unable to say with respect to the Dime Savings Bank whether they started an exhibition of merchandise before or after the Franklin National Bank?

A. No, I cannot say that.

Q. For all you know they copied the Franklin National Bank?

A. Could be the other way, too.

Q. Could be that way also, could it not?

A. Could be.

Q. What internal feature or features of a savings bank other than the word, savings, differentiates a savings bank from other banks?

A. I don't quite get that question.

Q. Well, now you testified about the internal appearance of a savings bank. As I understand your testimony, you say there are two things, one, new accounts, plus the sign, [fol. 108] savings, which you consider make up the appearance of a savings bank?

A. Plus deposit tickets and withdrawal tickets on the counters.

Q. Do not commercial banks have signs saying, new accounts?

A. Some of them have, some have not.

Q. Except for the sign, savings, what differentiates the internal appearance of a savings bank from any other bank?

A. Except for the sign, savings, that is all, no other difference.

Q. They appear to be the same? They all have counters?

A. No. Wait a minute now. In a savings bank they

usually have murals painted around the walls in savings.

Q. Commercial banks have too, do they not?

A. Some of them do.

Q. Do the banks you have visited, all banks, endeavor to sell Government bonds?

A. Yes.

Q. United States Savings bonds?

A. That is correct.

Q. They advertise that fact in banks?

A. That is right.

Q. And use the word, savings in doing so?

A. United States Savings bonds.

Q. They are requested by the Federal Government, Treasury Department, to do that, to sell them?

A. That is right.

Q. And they all do?

A. They do.

Q. Whether they are a savings bank, a savings and loan association or a commercial bank?

A. That is right.

Q. On redemption they are paid for the service in redeeming those bonds?

A. That is correct.

Q. They provide a service in the banking business in selling bonds to their depositors, is that right?

A. Yes.

[fol. 109] Q. That is a use of the word, savings, in the banking business, is it not?

A. I said, yes.

Q. Did the Banking Department ever take exception to that?

A. Not to my knowledge.

Q. Is not that a violation of law as you understand it?

Mr. Rollins: That is objected to.

The Court: I sustain the objection.

Q. Is there anything other than the word, savings, you observed in the Franklin National Bank that resembles a savings bank?

A. Yes, in the Franklin Square bank you have a sign,

Franklin National Bank, you had a sign stating they were to pay dividends on deposits.

Q. Dividends?

A. Dividends.

Q. The Franklin Bank?

A. I think it was dividends or interest, pay interest.

Q. Don't you see that in other banks? Would you see that in commercial banks, interest?

A. Pay interest, yes.

Q. A sign about paying interest?

A. Yes, but they do not use savings account.

Q. What, in connection with the Franklin National Bank, other than the use of the word, savings, give it the appearance of a savings bank?

A. On account of the fact they have counters saying, Christmas Club, over the top of each teller's window.

Q. Then it is only the use of the word, savings?

A. Nothing else.

By Mr. Rollins:

Q. When you went to the defendant's bank, you were [fol. 110] acquainted were you not, because of information furnished you that it was a National bank?

A. That is correct.

Q. So that you knew it was not a State savings bank or a State savings and loan association before that?

A. That is right.

Q. So, when you went to the bank and made the inspection that you did make, you were not fooled because of that reason in believing it to be a savings bank?

A. That is right, I was not fooled.

Mr. Grimes: I object.

The Court: Allowed.

Q. When you want to make your investigation in April, 1950 as to the activities of the defendant bank with respect to their savings department, was it your purpose in discovering facts as they affect the public?

A. That is true, yes.

Q. When you said you were not fooled that it was a

savings bank and creating the impression it could give the same effect to the public?

A. Oh, no.

Mr. Grimes: I object to it.

The Court: I have to sustain the objection to the form of the question anyway.

Q. The fact you knew it gave the appearance and acted as a savings bank in your opinion would that have the same effect on people who were not schooled like yourself?

A. No.

Mr. Grimes: Objection. Purely argumentative.

[fol. 111] The Court: Sustained. Strike out the answer.

Q. Speaking to you specifically with reference to the affidavit referred to by Mr. Grimes in his cross examination, affidavit sworn to May 12, 1950 in support of the application for a temporary injunction, wherein you state that—

Mr. Grimes: I am going to object to reading the affidavit, any portion of it not read.

The Court: I will have to hear the question.

Q. Wherein you state the same language he stated, building used exclusively for savings accounts, and is constructed—

Mr. Grimes: I object to that question.

Q. Referring specifically to your affidavit, May 12, 1950, submitted to Special Term, Part I, New York County in support of the application for a temporary injunction in this action, did you intend to convey by your statement in that affidavit referring to connecting building, used exclusively for savings accounts by depositors constructed—

The Court: I understand he is consulting the affidavit to be reminded of the language in it. He cannot read from something not in evidence. He may consult the affidavit to get his language.

Mr. Grimes: He was reading. I think he was. That was the basis of my objection.

[fol. 112] Q. (Continuing:) —when in substance you stated in your affidavit, May 12, 1950, referred to by Mr. Grimes on cross examination, wherein you stated—

Mr. Grimes: That is what I object to.

The Court: If he paraphrases it in his own language.

Q. That the defendant bank gave the impression that it was by physical structure and appearance, that it was a savings bank, was it your conclusion it gave that effect to you or to the public?

Mr. Grimes: I object. Leading.

The Court: I would have to sustain the objection.

Mr. Rollins: I call your Honor's attention, that was the specific question asked of this witness. He said, did you make that statement. He still said it is true, yet he said he was not fooled.

Mr. Grimes: I did not ask him that.

Mr. Rollins: Yes, you do. That is what the effect of your examination is. I am trying to inquire whether the effect was his when he made that statement, or did he calculate it to have that effect on an unwary public.

The Court: I do not think there is enough to allow that.

Q. Advertisements by banks use the statement interchangeably, advertising for accounts, compound interest [fol. 113] accounts, special interest accounts, thrift accounts, are those terms used generally by National banks, savings banks or both?

A. Those terms are used by a commercial bank, either State or National, or any institution not authorized to use the word "savings."

Q. Do you know any savings bank using any of those in advertising terms?

A. No.

Mr. Rollins: No further questions.

Mr. Grimes: No further questions.

Mr. Rollins: I now offer negative certificate of the State of New York Banking Department certifying that the defendant is not authorized to do a savings bank business or savings and loan association business in the State of New York.

The Court: Any objection to that?

Mr. Grimes: None whatsoever.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 33.)

Mr. Rollins: I offer in evidence certificate issued by the Comptroller of the Currency of the United States evidencing the incorporation of the defendant corporation, the original of which is annexed to the motion papers for a temporary injunction as part of the file record. I ask the photostatic record be marked in evidence. This was in 1926, challenging the constitutionality of the act of 1872.

Mr. Grimes: I have no objection to this at all, photostat or otherwise.

[fol. 114] Mr. Rollins: I also want to offer—

The Court: Mark it.

(Paper received in evidence and marked Plaintiff's Exhibit 34.)

Mr. Rollins: I offer in evidence change of name of the defendant corporation from Franklin Square National Bank to Franklin National Bank of Franklin Square, by certificate of the Comptroller of the Currency and certification thereof by him, the original of which is on file with the motion papers for a temporary injunction. That is with the filed papers in the County Clerk's office.

(Paper received in evidence and marked Plaintiff's Exhibit 35.)

MOTION TO AMEND COMPLAINT AND RULING THEREON

Mr. Rollins: The plaintiff moves to amend its complaint to conform to the proof.

Mr. Grimes: I oppose the motion, unless I know in what respect.

Mr. Rollins: I ask for leave to amend. The defendant cannot be injured or harmed. He has been fully advised in a bill of particulars furnished pursuant to his demand.

Mr. Grimes: What is the motion?

Mr. Rollins: To amend the complaint to conform to the proof.

Mr. Grimes: In what respect? Withdrawing?

Mr. Rollins: No, adding to, I believe.

[fol. 115] The Court: Suppose, when you have time to do it you prepare your amendment, whatever it may be, and we will take it nunc pro tunc and I will rule on it nunc pro tunc. I do not think there is going to be any objection to it

because they do not want to go all over this thing again because of any particular omission in the pleadings. They are here now to meet this thing in a frontal defense.

Mr. Rollins: I move to amend the complaint to include these additional paragraphs and provisions. That by reason of the facts—

Mr. Grimes: May we know?

Mr. Rollins: I am going to ask that paragraph 9 be considered 10 and that in lieu of paragraph 9 I substitute the following paragraph in the complaint, so that it will be an insert, so that the last paragraph of the complaint stating the plaintiff has no adequate remedy at law be the last paragraph of the complaint. I move to amend the complaint by inserting the following paragraph between 8 and 9 of the complaint.

The Court: To be known as paragraph 8-A.

Mr. Rollins: That the acts complained of as hereinbefore alleged violated the provisions of Section 258, subdivision 1, of the New York State Banking Law, because the defendant, Franklin National Bank had no power to engage in business as a savings bank in the State of New York and that the [fol. 116] defendant, by the acts complained of has practiced fraud and deception on the public by sign, representation and by advertising for savings accounts, in advertising for savings accounts, using the prohibited term, saving or savings, and in the use of such terms in its dealings with the public, the defendant not only committed a public nuisance but usurped the rights and franchises reserved exclusively for savings banks and savings and loan associations authorized to do business as such in the State of New York under the provisions of Section 258, subdivision 1 of the New York State Banking Law.

Now the plaintiff rests.

The Court: Any objection?

Mr. Grimes: We will simply deny each and every allegation contained in the amended complaint in paragraph 8-A.

The Court: The motion is granted and the denial will be accepted as if it were in the answer.

Mr. Rollins: Plaintiff rests.

The Court: If you want to call your witnesses before you make your motion, that will be all right.

Mr. Grimes: I would like to call Mr. Schoen. I am calling him out of order.

[fol. 117] EUGENE SCHOEN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 69 Washington Place, New York City.

Q. What is your business, Mr. Schoen?

A. I am an architect.

Q. How long have you been an architect?

A. Forty-five years.

Q. Where did you take your professional education?

A. Columbia University.

Q. State your degree?

A. In 1902 as Bachelor of Science, Architecture.

Q. Did you study abroad?

A. I studied in Vienna for about six months.

Q. After that what did you do?

A. After that I came back to America and got a job with a number of architects and in 1906 began practice myself.

Q. With the exception of World War No. I have you been practicing architecture since that time?

A. Consistently.

Q. Have you done considerable department store work?

A. I have.

Q. For whom? If you will, name some of the more prominent department stores.

Mr. Rollins: I will concede this man's qualifications as an expert builder; fine reputation. I know him personally.

Mr. Grimes: I would like to get his experience on department store architecture. I think it will be very brief.

[fol. 118] The Court: All right.

The Witness: I have done interior designing, exterior designing for concerns like Martin's in Brooklyn, Marshall

Field in Chicago, Kaufman in Pittsburgh, Stern Brothers in New York, Macy in New York and a number of others.

Q. Have you also done some theatre work?

A. Yes. I did the Centre Theatre for Mr. Rockefeller in Radio City.

Q. Have you also done some bank work?

A. About 60 banks throughout the United States.

Q. Did there come a time when you were called as a consulting architect in connection with reconstruction work by the Franklin National Bank?

A. There was a time.

Q. Will you state what the circumstances were?

A. Mr. Roth, president and Mr. Carlson, an architect came over to my office and propounded a rather interesting problem to me that they seemed to find a little difficulty in getting a correct solution for in which they explained to me they wanted an interior design, even exterior design to their bank which would combine the idea of a bank and department store, and that I had been recommended to them by the Manufacturers Trust Company as a person who might help them in that respect.

Q. Did you accept the commission?

A. I did.

Q. Did you do architectural work? That is to say, did you make a design?

A. I did.

Q. Was that design accepted by the bank?

A. It was accepted and executed.

Q. I show you Exhibit 18 and ask you whether this [fol. 119] represents a portion of your own architectural work?

A. Yes. The building on the right, that is the tall building on the right known as part of No. 2 building by a previous witness, the facade, that was designed by me in my office.

Q. Have you done interior work in architecture?

A. Yes, I have done a great deal of it.

Q. Will you state to the Court briefly what your experience in that field has been?

A. I redesigned the steamship Leviathan; I have done interior——

Q. That is interior?

A. Interiors, yes; I have done interiors in offices, in wholesale manufacturing establishments, banks, commercial buildings of all kinds and dozens of residence interiors.

Q. Did you work on the interior design of the Franklin National Bank building No. 2?

A. I did.

Q. When we say building No. 2, it is true that you refer only to that portion which does not include the smaller building which appears on the right hand side of the picture?

A. That is correct.

Q. What were your instructions from the Franklin National Bank with regard to the design of the interior of building 2?

A. That I should make it look as little like a bank as I possibly could and as much like a department store as I possibly could.

Q. Did you endeavor to do so?

A. I endeavored to do so.

Q. Did you achieve the intended design?

A. I think so.

Q. You say you have designed some sixty banks?

A. Yes.

[fol. 120] Q. Throughout the country, is that correct?

A. Correct.

Q. You have been a student, of course, on architecture ever since and have seen designs, I suppose, for banks all over the world?

A. Yes.

Q. Referring to what you refer to as building No. 2, did you ever see any place in the world a bank that looks like building No. 2, either from the exterior or interior?

A. I never have.

Q. It was your deliberate purpose to make it look as unlike a bank as possible, is that correct?

A. Those were my instructions, and that was my intention.

Q. Could you state to the Court some of the ways in which that was carried out?

A. In the first place, there was a tremendously large window placed throughout the entire front of the building,

which is a characteristic of commercial buildings of all kinds, and particularly of department stores, in view of the fact there was an illuminated cornice running on the inside of the front at the second floor level with a display platform upon which I advised the bank from time to time to make displays that were illuminated at night so that people walking through the streets might see the various displays of various objects the bank was going to lend money on if they purchased them.

Q. Would that be in the second tier?

A. No, it would be below the middle line, from the middle line to the lower line.

Q. Point out to the Court where that would be.

A. It would be just slightly above the first horizontal bar and down to the top of the cornice of the show window. [fol. 121] Q. That window was built that way?

A. Yes, yes. It is that way now.

Q. Did you receive instructions with regard to street level windows how they should be made?

A. Yes. We were going to sell automobiles there, and it was important they be able to get automobiles in and out, so the main show window on the west side doorway was a movable window, they could take out and bring cars, airplanes, anything else they wanted to bring in the building to carry them through that opening, because there was no other way of getting them in the building.

Q. Were you at the opening of building No. 2?

A. Yes.

Q. Did you see airplanes at that time?

A. I saw part of one.

Q. How much of the airplane?

A. All but one wing.

Q. That was suspended from the ceiling?

A. That was suspended from the ceiling.

Q. Was there some form of hook there which enabled one to suspend that portion?

A. Yes. Throughout the entire ceiling of the bank room I had hooks installed so we could suspend displays wherever we wanted to in that room.

Q. The hooks are still there?

A. Those hooks are still there.

Q. As to counter design, was there anything unusual about that?

A. Yes, yes, the counters were display counters such as we use in department stores, in that a customer would come in, look in the display window and see merchandise that was to be sold, or credit established on, and there was no railing or no screen of any kind that separated the teller, or the [fol. 122] person who was attending to the customer from the customer himself, it was just a series of department store counters that ran around the interior of the room.

Q. Had you ever seen any such type counters in any bank before that?

A. Not that particular type of counter.

Q. Have you seen any since?

A. No, I have not.

Cross-examination.

By Mr. Rollins:

Q. You were consulted to give advice, not receive it, were you not? As an architect you gave advice?

A. I could not possibly give advice unless I knew what I was to advise on.

Q. So you say it was in resurrecting this place or renovating this place, it was your primary objective that you attain so that your work would reflect the premises, that is building No. 2, as a department store rather than as a bank?

A. A bank which had——

Q. Yes or no?

A. You cannot answer that question that way.

Q. Did you tell us that was your instruction to make it not so much like a bank, but a department store?

A. Yes, not so much.

Q. You say you made those?

A. Not as much a bank as a department store.

Q. Did you effect a department store atmosphere? Yes or no?

A. I did to a large degree, as far as it had to go.

Q. Look at Exhibit 23 and tell me if any part of that photograph suggests a department store atmosphere, yes [fol. 123] or no?

A. This portion that you see in here is a portion of the building which I had nothing whatsoever to do with.

Q. What is that?

A. That is the low extension on the side that your witness called as part of building 2.

Q. In other words, it is the extreme right?

A. It is a low extension on the west side.

Q. When did you finish your work?

A. I should imagine about three years ago, maybe longer, I am not sure, but it is about three, I should say. This portion you see up here is part of my work, but this opening, that was cut in afterward.

Q. Since the time you finished your work someone else added something to it?

A. Yes.

Q. When was the last time you saw the defendant bank premises here?

A. Several years after I completed the work.

Q. When was the last time?

A. I should say about two and a half years ago perhaps, I am not sure.

Q. So you do not know what the physical condition of the premises are today?

A. No, I do not.

Q. So, if after you completed your work, something else had been added to change the original physical purpose of your work, you would not know anything about it?

A. I would not, no.

Q. You say by looking at Exhibit 23, that was no part of your work, is that right?

A. The lower part of it, below this cornice here.

Q. Look at Exhibit 23, please?

A. Yes.

Q. Will that give the impression banking business is being conducted there?

[fol. 124] The Court: Question withdrawn. Go ahead, answer the last one.

The Witness: That lower portion is part of my work, and that is part of that counter which I designed; this portion in here, it is to that portion in the back to which I refer that I know nothing about.

Q. You mean where it says, new accounts, was your handiwork?

A. I do not see where it says—oh, well, no, then even this not part of my work.

Q. By this you refer to the counter set aside for new accounts?

A. This prominent area in front, yes.

Q. The only work you recognize on Exhibit 23 is work near the ceiling?

A. Right.

Q. What work did you do below that portion?

A. There was a wall there. When that wall was there we had exhibits there, displays of one sort and another; we had a children's alcove where children would come and make their deposits and build a Christmas fund up; we had a space for showing off an automobile toward the front of the building; that was all in that wall space. That was removed later to create this interior you see there.

Q. Will you look at Exhibit 23 again and tell me whether the tellers' windows bear the legend, savings, was constructed by you?

A. No, they were not.

Q. That was done presumably sometime after you had done your work?

A. Subsequently, yes.

Q. You do not know until this day there has been something different than what you did, is that right?

A. That is right.

[fol. 125] Q. Will you look at Exhibit 22 and tell me whether you constructed that portion of the premises in whole or in part?

A. I think this was all constructed by me, yes, all of this.

Q. Does that portion that you are looking at give the impression it is a department store?

A. Yes, yes, yes. It also of course, has a couple of windows that work into the bank, too.

Q. Tell the Court, please, what distinctive feature on that exhibit gives the impression it is a department store?

A. For example, this counter here with its little display in it, and the general treatment of it all; of course, this picture does not show all the furniture that was put around

there, it is only part of it, and it takes specifically into view two windows; that is all opened up into the tellers' section of a commercial bank. Originally when I designed the interior here, naturally if we had that, two windows here, you had to have a little check desk over here at which people could prepare their deposits.

Q. You mean that is different than any other bank?

A. This particular little corner is not different than many other banks. Yes, I would say it is very different because you never see banks that have screens in them that are not continuous, and this screen is interrupted by a wall which has display advertising on it, and it was made out of cork in order that we could put display advertising on it. That is never seen in a bank.

Q. That does not look like a bank?

A. No, it does not look like a bank.

Q. Looks like a department store?

A. Yes, for instance, like the credit account department [fol. 126] of Macy's or any other department store.

Q. Look at Exhibit 23. You say that tells anybody the story, that is a department store?

A. I would not say that looks like a bank.

Q. It looks like a department store?

A. As I say it might look like a credit department of a department store.

Q. Might look like a bank?

A. Yes, might look like a bank or restaurant, anything else you choose to make it.

Q. Looks like a restaurant now?

A. Might be a counter in a restaurant, surely.

Q. Look at exhibit 28. Did you construct any part of that?

A. Yes, I designed the entire thing.

Q. Did you also supervise and construct the physical interior there?

A. Yes.

Q. You say that gives the impression of a department store?

A. That gives the impression of a specialty store.

Q. Specialty store?

A. Any store which sells things is called a department, specialty store, depending on the types of merchandise they sell; it looks like a store, let us say that.

Q. Anything unusual for a bank to have a store?

A. Yes, very unusual.

Q. Even in Bensonhurst?

A. Yes, I designed the Bensonhurst National Bank.

Q. You do not know of any bank in this country that occupies store premises?

A. Well, I know many banks.

The Court: Does that have any bearing? You are talking to this gentleman about new construction. You are not talking about something improvised?

[fol. 127] Q. You say it cannot create the impression that was a bank at all?

A. I would not say so, no.

Q. A person finding himself in that atmosphere would believe that he was in a store rather than in a savings bank?

A. Absolutely.

Q. You say that based on your many years experience?

A. Certainly, yes.

Q. How about the situation disclosed in exhibit 24? Would you say likewise that the atmosphere disclosed in that likewise creates the impression it is a department store rather than a bank?

A. I would say that this interior represents anything but a bank.

Q. Your answer is the same for the physical condition set forth in exhibit 25?

A. I should also say the same thing about this exhibit.

Q. Also with respect to exhibit 21, is that right?

A. No. No. 21 has a screen on it, typical of a bank.

Q. Did you do that work?

A. No, I did not.

Q. The purpose of having exhibits in back of the savings department of the defendant if you know, was intended to draw a lot of people in that place, a come-on, is that not right? In other words, it is one of the advertising methods used by this defendant to attract people, bait them?

A. I should say so.

Q. That was merely incidental to the banking business to be conducted there?

A. (No answer.)

By the Court:

Q. The question was, did you receive those instructions?

A. No, I did not receive those instructions.

[fol. 128] By Mr. Rollins:

Q. Were you advised why they wanted to use all these exhibits in back?

A. Yes, surely.

Q. Why?

A. Because they said, and I agreed with them, it was a very sound piece of banking business that where you lend money to your clients, customers to purchase articles for personal consumption it was possible for them to see what they were buying, and that is what the bank wanted to do.

Q. That is what you told the bank?

A. No, that is what the bank told me they wanted to do.

By the Court:

Q. Had you finished the answer to the question of why your client said to you they wanted to have a building as unlike a bank and as much like a department store as you could make it? Had you finished your answer?

A. I did, yes.

By Mr. Rollins:

Q. Did they also tell you they wanted to have some new advertising medium to attract people to the bank, to have them talk about it?

A. Oh, no.

Q. They just did that so people who made a deposit would know what they were buying?

A. Certainly.

Q. What did the bank sell?

A. The bank did not sell anything except loans.

Q. Can you give any sound reason why the bank should tell you?

A. Counsel, may I elaborate a little in giving an answer?

[fol. 129] The Court: Sustained: The form of the question.

Q. When you walk in this bank your conclusion is you do not think you are in a bank, you think you are in a department store?

Mr. Rollins: I withdraw the question, because it is apparent he has not been in.

Q. It is apparent to you something has been added to your work?

Mr. Grimes: I object.

The Court: Strike out the remarks.

Q. Your testimony given on direct examination was given as to your opinion as to the condition that existed two and a half years ago or more, is that right?

A. One that I created two and a half years ago.

Mr. Grimes: I object to that upon the ground it is an improper characterization of what his testimony was.

The Court: Let the answer stand. Go ahead.

Q. I have also shown you photograph, exhibit 21 of defendant's premises and you say that condition is not one of your making, is that right?

A. That is true.

Q. So your testimony was given with respect to a condition which existed, and which you created, about two and a half or more years ago, is that right?

A. Correct.

[fol. 130] Q. And you do not know what happened since that time?

A. I do not.

Q. If there had been a change as indicated on plaintiff's exhibit 21—

The Court: You asked him that before.

Mr. Rollins: I move to strike out all of his testimony, having no probative force as to the condition existing today and at the time this action was brought.

The Court: Motion denied.

JOHN R. EVANS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 5 St. John's Parkway, Poughkeepsie, New York.

Q. What is your occupation?

A. President, First National Bank of Poughkeepsie.

Q. How long have you been president of that bank?

A. Ten years.

Q. Will you state briefly to the Court what your banking experience has been? First, state please, what is your education?

A. I am a graduate of Pennsylvania State College, A. B. degree, 1922, specialized in commerce and finance.

Q. After that what did you do?

A. I was teacher in high school, head of the commercial department.

Q. What subject?

A. Banking and economics, accounting.

[fol. 131] Q. Have you taught in the American Institute of Banking?

A. Many years.

Q. Would you state briefly what your banking career has been? When did you go in banking first after teaching? How long have you been in a bank and banking?

A. In 1923 I started banking and I have been cashier of three banks, then I was executive vice-president of another bank and also another one, same bank I am now president of.

Q. Did there come a time when you also worked for the Comptroller of the Currency?

A. Yes, I was called in by the Comptroller's office, 1933 to help them out in the re-organization of banks.

Q. In your area is your bank in competition with other banks?

A. Yes.

Q. What are they?

A. We have in our city——

Mr. Rollins: One objection at this time. The testimony sought to be elicited by this question is immaterial, not

evant to the issues presented in this case, far afield
ended to protract the issues.

The Court: I will take it, subject to a motion to strike out.
do not know what is coming, so we will treat it that way.
What is your answer? You are in competition with other
banks in your community?

The Witness: Yes.

By Mr. Grimes:

Q. What are your banks?

A. We have five commercial banks in our city; one commercial bank and one savings and loan association.

fol. 132] Q. Do you compete with them for deposits?

A. Yes.

Q. You also compete with banks in the New York area?

A. Yes.

Q. To what extent, and how?

A. Mostly on the industrial side, and also on the loan side.

Q. Poughkeepsie is how many miles from New York City?

A. About 80.

Q. People there read metropolitan newspapers?

A. Yes.

Mr. Rollins: I understand I will not have to object to all these questions?

The Court: No. You can move to strike out when we come to some point this is leading up to.

Q. Do metropolitan newspapers handle advertising of savings banks and other banks in New York City?

A. Yes.

Q. Based upon your opinion, and in your experience, have you formed an opinion as to the efficacy and usefulness of various words that are used by banks to advertise accounts which bear interest?

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial.

The Court: I will let him answer.

The Witness: Yes.

Mr. Rollins: All this subject to my motion to strike out, or if this is of a particular category I suggest I be per-

mitted to object because my memory cannot—May I move on the primary question?

The Court: I cannot rule on the question of competition [fol. 133] because I do not understand it yet. You will have to keep that in your mind. That is one thing I ask you to wait for. Maybe they are going to develop the point of advertising, using those words you say are forbidden. Have not got it yet.

Q. What is that opinion?

A. Beg pardon?

Q. Based upon your opinion and in your experience have you formed an opinion as to the efficacy and usefulness of various words that are used by banks to advertise accounts which bear interest?

A. I would say yes.

The Court: The question now is, what is your opinion.

Mr. Rollins: I object on the same grounds, incompetent, irrelevant and immaterial.

The Court: I will take it.

The Witness: I operated a bank for about ten years in Pennsylvania, and we were allowed there to use the word "savings accounts".

Mr. Rollins: I move that be stricken out.

The Court: Strike that out. The question is to give your opinion, not specific instances, which means the result of your experience.

The Witness: I have found, in my experience, it is a definite disadvantage not being able to use the word "savings".

Mr. Rollins: I object and move that testimony be stricken out, incompetent, irrelevant and immaterial.

The Court: Sustained. Strike it out.

[fol. 134] Q. What words, or combination of words are used by banks in advertising the fact that they have, render to the public service, receiving deposits and paying interest?

Mr. Rollins: Objected to, not being within the issues; incompetent, irrelevant and immaterial.

The Court: Allowed.

The Witness: Interest accounts, compound interest accounts, thrift accounts, savings accounts.

Mr. Grimes: Might I ask whether your Honor has considered this witness qualified as an expert? I can go into much greater detail as to qualifications. Time is short.

The Court: He is qualified with respect to some things. It will depend upon your questions.

Mr. Rollins: May I at this time call your Honor's attention there is a National bank being charged with a violation of law. Banks cover a vast territory. He asked him about advertising of banks. Whether he means savings banks, trust companies.

The Court: He says, all banks. I can only judge that by the questions. He is qualified as an expert in my judgment.

Q. Because of the practice of your calling as a banker, and especially as president of a bank for the last ten years, have you made a study of the use of various words which are employed in ads, whether by conversation or newspaper ads or otherwise, to endeavor to persuade persons to place their [fol. 135] money in a bank at interest? Have you done that, sir?

A. To a limited degree, discussion with my staff, and people who have those type of accounts.

Q. Have you discussed the problem of the use of these words with other banks?

A. Yes.

Q. Other bankers, National bankers?

A. Yes.

Q. Have you discussed it with your employees?

A. I have.

Q. I believe you said you have. Based upon your discussions, your conversations and your experience, have you formed an opinion as to which of these various words mean most to actual or potential depositors of a bank?

A. It is my opinion—

Mr. Rollins: I object to the question, first upon the ground he is not qualified.

The Court: I am going to sustain the objection.

Mr. Grimes: May I ask the ground?

The Court: I do not think that is a question for the witness to answer. The advisability or value of the New York statute cannot be inquired into in this proceeding, and that is what the question seems to develop.

Mr. Grimes: Oh, no. May I deny that is any part of the purpose of the question? The purpose of the question is to obtain his opinion as to the value of these various words. It is our contention we are seriously harmed if we are not permitted to use the word "savings" because it is the one word the public seems to understand best. These other words are not understood by the public, and we are there- [fol. 136] fore, harmed in our banking business, and it is for that purpose and that purpose only I am asking this question. We of course cannot challenge the advisability of the statute. We are challenging the constitutionality only, and it is part of our proof which I would like to offer. We will call many expert witnesses who will express their opinion upon the value of the word "savings", and the extent to which we are harmed if deprived of the use of the word "savings", and from the standpoint of the public there is no adequate substitute. This witness is called for that purpose, in part. That is the purpose of my question, and we intend to call witnesses to testify to the same effect. I qualified him as an expert to speak on the subject and express his opinion as to the value of these various words.

Mr. Rollins: I submit any such expert testimony is not competent or material to establish a constitutional question of law. Constitutional law is only a question of law, whether it tends to be discriminatory whether there is a United States statute superseding.

Mr. Grimes: The doctrine we invoke here is, any statute of the State which impedes or impairs or interferes in any way with the function of a Federal instrumentality, such as a National bank, is unconstitutional, and is therefore void. It is our contention that National banks are in competition with other banks. Secondly, as an essential part [fol. 137] of that competition they must advertise; third, active advertising is of vital importance; fourth, we propose by many witnesses to show the word "savings" is the only word properly understood by a large part of the public to describe, in connection with describing, the function that savings banks and National banks both render, and that since the statute purports to prohibit us from using those words, we are harmed, and seriously harmed. That is the purpose of this proof. That is my over-all purpose through

this witness, and we have quite a number of other witnesses to testify to that same general fact. This is a field in which I think we may properly produce expert testimony. It is also part of our proof to introduce testimony to show what knowledge the public actually does have on this subject. We propose to prove that the public has knowledge of the words "saving" and "savings." It goes to show the really appalling ignorance on the part of the public as to what such words as "thrift account" "compound interest account" and "special interest account" mean. It is our contention, and we offer to prove the public really does not understand those other terms; it understands compound interest to some extent, thrift and special interest practically not at all; it has no understanding of those words, and a great percentage of the public does understand the word "savings", and only by using that word can we advertise and compete on anything like equal terms with other banks. For the life of me I do not know how we can do that unless we proved it by experts, and secondly, by interviews with other people. Those are the types of proof we propose to offer on this subject, and in line, in support of our argument that this statute prohibits and hinders us in the same manner the statutes have hindered National banks in those cases where they have been declared unconstitutional for that very reason. That is our offer of proof and I submit I have qualified this witness to testify on that subject, and he is called for that purpose.

Mr. Rollins: It all boils down to the same speech, the act is oppressive. That is a matter for the Legislature, by repealing that.

The Court: I have heard argument and I make this ruling. The evidence will be received. One of the requirements placed upon the defendant to establish the unconstitutionality of the State statute under attack at law, is that the defendant show that the statute, by its prohibitions, interferes with the effectuating of the objectives of the act of Congress. The act of Congress concededly allows National banks to receive deposits, upon which they pay interest. The contention of the defendant is that, having that right, it should have the right to attract persons to make those deposits by advertising. The State has prohibited by law

[fol. 139] (Section 258 Banking Law) the use of the words "saving" and "savings" or their equivalent, in any form of banking which may be employed by defendant for the purpose of attracting the depositors to its bank, which the act of Congress authorizes it to receive. Such interference may be a question of fact, or law, or both. If it is a fact it is only proper for the defendant to adduce evidence to demonstrate in just what way, if any, the inhibitions in the statute of the State interfered with the effectuating of this plain objective of the act of Congress. The witness will answer.

Mr. Rollins: May I also ask your Honor to make a ruling, so I will understand. Does your Honor rule the Federal Reserve Act, the year 1935 is ambiguous?

The Court: I do not care to make a ruling just abstractly. There is no point in my making it.

Mr. Rollins: May I ask this. There is Federal statute——

The Court: Just a moment. I have ruled.

Mr. Rollins: May I respectfully except?

The Court: Take an exception. Do not argue that question any more. I have decided.

Mr. Grimes: May I point out we also as a matter of law, urge it is unconstitutional.

The Court: Whatever the law is overhangs every law suit. The only question is whether I should receive factual [fol. 140] evidence to support that proposition of law. The witness may answer the question.

The Witness: Hear the question?

Q. Have you formed an opinion as to which of these various words mean most to actual or potential depositors of a bank?

Mr. Rollins: May I have an objection to every question asked this witness and an exception?

The Court: You will have to do that. I do not know what they are going to ask. I will make a ruling. You may have an objection and an exception to testimony given by any witness along these lines, you may have that, but I do not know just what separate questions will be propounded.

The Witness: The word "savings" has the most attraction, and I think we are definitely handicapped competitively by not having the right to use that word.

Q. Has your bank tried to use a substitute for that?

A. Yes. We use "interest accounts."

Cross-examination.

By Mr. Rollins:

Q. Those National Banks have been formed under Section 258 of the State Banking Law which prohibits—

Mr. Grimes: I object to the question.

The Court: Start again.

Q. Those National banks of which your bank is one, has [fol. 141] conformed with State law prohibiting National banks from using such terms as "saving" or "savings" or the equivalent in the solicitation of accounts?

A. That is right.

Q. Those terms are used exclusively by National banks, is that right, terms such as compound interest, account, thrift account?

A. I would say quite generally.

Q. National banks only, is that right?

A. No.

Q. Savings banks use that?

A. No, State banks.

Q. What is that?

A. State banks, State commercial banks.

Q. A National Bank is a commercial bank?

A. That is right.

Q. Did your bank prosper during these years?

Mr. Grimes: I object.

The Court: Allowed.

Q. Did you in the last ten years increase your business?

A. Yes.

Q. Did your savings department increase?

A. Yes.

Q. The last five years how many million dollars did your bank increase?

A. Probably four million.

Q. How much was it before that time?

A. Seven million.

Q. How much was your savings account in the year 1950?

A. Eleven.

Q. In 1949?

A. Ten million five hundred, I would say.

Q. Less each year prior to 1950?

A. Yes.

Q. And number of accounts?

A. Yes.

Q. So your bank has prospered in spite of the fact it has used in its advertising and solicitation of savings accounts the term such as special interest account, is that right?

A. All banks have prospered. We have not gained as [fol. 142] much as savings banks in our own community.

Q. All National banks made money despite the fact they are restrained from using the term "savings" and do not use it?

A. Fair return on our money, on our capital.

Q. Substantially so?

A. No. I would say fairly so.

By the Court:

Q. Implicit in that last question was that no National bank uses the words "saving" or "savings", do you mean to say that? Is that so? I mean, I do not challenge the statement, but I want to make sure.

A. He is talking National banks throughout the country.

By Mr. Rollins:

Q. New York State.

A. I would say most of them use a word other than savings.

Q. That is because the statute requires it, State law?

A. Yes.

By the Court:

Q. When you say most of them use it, then some use the word?

A. I do not have knowledge of that.

Q. You must say that. In your answer before you indicated none of them did. You did not mean to say that?

A. No.

By Mr. Rollins :

Q. Are State commercial banks subject to the same Section 258 under the State charter?

A. That is my understanding.

[fol. 143] Q. They also have time deposits?

A. Yes.

Q. By time deposits is meant savings account, is that right? That is money deposited for a certain stated specific time, which bears interest?

A. That is right.

Q. All savings accounts are called time deposits, are they not, not as savings banks, I am talking about a deposit that pays interest.

A. Called interest deposit.

Q. What is a time account?

A. A time account, it is an account that bears interest.

Q. So whether money is deposited with a commercial bank, savings bank or trust company, which bears interest, it is called a time account?

A. Yes.

Q. So a deposit in a savings bank is called a time account?

A. Is called a savings account.

By the Court :

Q. A deposit in a savings bank is called a time account, is it not?

A. I would not say so, no. I would say it is called a savings deposit.

By Mr. Rollins :

Q. Did you ever read the statistics of the Superintendent of Banks of the State of New York?

A. No.

Q. You know there is an annual report, statistical report?

A. I do.

Q. Did you ever see that report?

A. I don't think I did.

Q. Did you ever see it listed as a time account?

A. I never saw it.

Q. Never saw the report you mean?

A. I never saw the report.

[fol. 144] Q. You mean to tell me in your experience as a banker and from your knowledge of banking that a deposit in a savings account of a bank is not called a time deposit?

A. I would say it is called a savings deposit.

Q. What is the distinction between a savings deposit and a time deposit?

A. No distinction, but just a different way of stating it.

Q. You said a time deposit is a deposit with a bank I assume of a stated sum of money which bears interest, is that right?

A. Yes.

Q. It is a natural function of any bank of whatever character to receive deposits and pay interest, is that right? Natural function of a bank? Elementary, is that not so?

A. Yes.

Q. That fact also exists with respect to a savings bank, no matter what you call it? Yes or no?

A. Yes.

Q. Your bank, as a National bank, has a savings department?

A. Has an interest department.

Q. Has a savings department where people deposit savings and receive interest?

A. Yes.

Q. Do they call that a time deposit account?

A. Yes.

Q. The only reason it is called a time deposit account is because it bears interest?

A. Yes.

Q. It is not recoverable on demand?

A. That is right.

Q. A checking account is one payable on demand?

A. Yes.

Q. That is the reason you call that a demand account?

A. Yes.

Q. You say there is a separate, third account, called a savings account as distinguished from a time deposit account?

A. I said an account in a savings bank is called a savings account.

[fol. 145] Q. A savings deposit in a savings bank as such under your definition of a time deposit can be considered a time deposit account, is that not right?

The Court: Are you not asking for what these men designate these things? Is that not what you are asking?

Q. You say you do not know that savings banks do not consider deposits in their institutions as time deposits?

A. I did not say that. I said I always consider them as savings deposits.

Q. How is it generally?

A. When they speak of them to me they always call them savings deposits.

Q. Never heard of them as time deposits?

A. I would not say I never heard of them as time deposits.

Q. You heard them called time deposits?

A. I don't know. I don't recall whether I have or not.

Q. Your information about the success of the savings banks generally in the State of New York, is that based on personal knowledge?

A. Personal observation.

By the Court:

Q. When you say personal knowledge, you mean from reports, so forth?

A. Yes.

By Mr. Rollins:

Q. Where did you get those reports from?

A. I received many of them from the banks themselves, from savings banks themselves.

[fol. 146] Q. How many banks?

A. Perhaps about twenty.

Q. During what period of years?

A. Period of the last ten years.

Q. You know, do you not, that a savings bank is not permitted to invest any monies or deposit monies in certain ventures that commercial banks are permitted under the law, don't you?

A. Yes.

Q. So that National banks and other commercial banks in New York State, chartered by the State, have other fields in which savings banks may not enter by injunction of law?

A. Yes.

Q. Now you feel a National bank should have an open field to compete in the field to which savings banks are restricted, is that your contention here?

Mr. Grimes: I object to that.

The Court: Allowed. Is that your feeling about the matter?

The Witness: I think we are definitely handicapped by not using the word.

Q. You make less earnings?

A. Yes, very definitely.

Q. Does not your field cover many other fields?

A. Yes. That does not prove the profit angle of the situation.

Q. You mean on the over-all National banks do not make any money?

A. They make money.

Q. Referring to your bank?

A. They make money but not in proportion to what savings banks do.

Q. What proportion is your commercial account with respect to your time deposits?

A. Forty—commercial did you ask?

[fol. 147] Q. Commercial and savings deposits.

A. About sixty percent demand deposits and forty percent time.

Q. Your profits of your business on your commercial accounts, how do they compare with monies invested in your savings account?

A. I would say we make more money from our interest department than we do from the commercial side of the bank.

Q. What percent?

A. I could not give it to you in percentage.

Q. How much did you make in 1950 on commercial accounts, in dollars and cents?

A. We do not have it broken down.

Q. How can you state you make more on your interest deposits?

A. I simply gave you an opinion.

Q. Your banking business in Poughkeepsie National bank business is it a thriving business?

A. Not thriving, ordinary.

Q. Making money?

A. Yes, we are making money.

Q. How long has your bank been in existence?

A. 1864.

Q. Has it gotten better each year?

A. No, since 1940?

Q. Yes.

A. Yes.

Q. What percentage each year?

A. I could not give you that. I don't know.

Q. When were you president of the bank?

A. About ten years ago.

Q. How about your ten year tenure in office? Did you do better than your predecessor or would you not know? Dollars and cents?

[fol. 148] The Court: Put that in a different way Those gentlemen would like to—

Q. Did the bank, that is what I meant, did the bank do better under your administration than your predecessor in the last ten years?

A. Yes. I am embarrassed to answer the question the way you state it.

Q. I do not want you to feel you are embarrassed and it is not my intention to be facetious about it. What percentage would you say in comparison with the prior ten years did the bank increase its profits in your tenure in office?

A. I would say better than three times, but I amend that by adding, due to the times.

Q. You could not ascribe it just because of Section 258 of the Banking Law, could you?

A. No.

Q. You did that despite the restriction, is that right?

A. Because of greater money supply.

Q. You made more money out of your special interest account than you did on commercial accounts despite the

fact you were not permitted to use the word "savings" in your advertising?

A. True.

Q. Do you want to conclude Section 258, the prohibition of the statute, worked a hardship on your bank?

A. I do.

Q. Despite the fact you increased business, made more money in your special interest account?

A. Yes.

By Mr. Grimes:

Q. Would you state why you did have this increase in [fol. 149] business? And increase in making money, profits?

A. Due to the increase in the money supply, the greater amount of money that industry demanded to carry on business, due to inflationary aspects.

Q. It was an inflationary era, was it not?

A. Yes.

Q. In your opinion your profit would have been greater had you been permitted to use the word "saving"?

Mr. Rollins: That is speculative.

The Court: He already answered that. He said it would.

Q. Do you know what, during the period of the past ten years the rate of interest, savings bank has been?

Mr. Rollins: I object. Not qualified to answer that.

The Court: I would have to sustain the objection. That would be hearsay. I think you could prove that another way by some report.

Mr. Grimes: Yes.

Q. Would you subscribe to the course the Superintendent of Banks pursued or not?

A. (No answer.)

By the Court:

Q. Would you recognize the report if you saw it?

A. Yes.

Mr. Grimes: Would you concede this is a report of the Superintendent of Banks of the State of New York?

[fol. 150] Mr. Rollins: I assume, if you say so. If you say it is, I will accept your word.

Q. I would just like you to look over this particular page and see whether or not you do not find the word saving and other kind of deposits in Schedule 1 on page 24 of the annual report of the Superintendent of Banks, year 1949, find that to be a summary of savings banks as such?

A. Yes.

Q. You find the Superintendent of Banks in that report refers to them as time deposits and savings deposits, making the distinction?

Mr. Rollins: This witness could never know, because he says he never saw a report.

Mr. Grimes: May I show that to the Court, please?

The Witness: I just read it.

The Court: Is there objection to that?

Mr. Rollins: Yes.

The Court: Sustained.

Mr. Grimes: No further questions.

Mineola, New York, January 25, 1951.

Trial Continued

MOTION TO DISMISS THE COMPLAINT AND RULING THEREON

Mr. Grimes: If your Honor please, we have a motion. For the purpose of this motion we respectfully request you disregard the testimony of the two witness- who testified last [fol. 151] night on behalf of the defendant. At this time the defendant moves that the complaint be dismissed and for judgment in its favor, upon the ground that the plaintiff has failed to make out the cause of action alleged in the original complaint and on the complaint as amended and has failed to make out any cause of action whatsoever. The specific grounds on which the motion is made are set forth in the memorandum of law which was submitted to your Honor in behalf of the defendant. For the purpose of the record, I will urge such grounds.

The Court: I do not think you need do that at this time. I am going to reserve decision on your motion, as I am going

to reserve decision on the motion at the end of the case and decide this after I have plenty of time to have your observations and your briefs.

Mr. Rollins: May I have permission of the Court to order the minutes?

The Court: I do not think I need them at this time, but I am glad you make that suggestion, and if I do you will have no objection. Up to now I have made notes as we have gone along and at the present time I do not see that I will need the minutes.

Mr. Grimes: Before we proceed, I would like to make a request that your Honor direct Mr. Seaton to remain present throughout the trial. I might wish to recall him on cross. I take it there is no objection?

[fol. 152] The Court: Mr. Seaton can be available?

Mr. Rollins: He is available, at my direction.

The Court: We do not have to have him present in the courtroom. Mr. Friedman, your preliminary statement to disregard the witness's testimony was just for the purpose of that motion?

Mr. Friedman: Yes, just for the purpose of that motion.

Mr. Grimes: We understood that was the ruling yesterday.

The Court: That is right.

HAROLD CARLSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 38-22 219th Street, Bayside, New York.

Q. What is your occupation?

A. Architect.

Q. How long have you been an architect?

A. Got my license in 1922.

Q. Was that the first year in which licenses were required under New York law?

A. I believe it was, yes.

Q. Is it true you are one of the first architects licensed?

A. I have a low number.

Q. Beg pardon?

A. I have a low number.

Q. Prior to that time what did you do?

[fol. 153] A. Architectural draftsman, and worked in that capacity for various architects.

Q. For how long a period of time?

A. Thirteen years.

Q. Would you state the year in which you began architectural work?

A. 1909.

Q. Where did you study?

A. Cooper Union and Columbia.

Q. Architecture in each case?

A. That is right.

Q. Do you do bank work in the architectural field?

A. That is right.

Q. How long have you done banks' architectural work?

A. Oh, since 1921.

Q. What did you do then? Were you in a company of some sort?

A. Yes, I was with Townsend & — was with them for three years; I was architect for Hogson Brothers who specialized in bank work, and after which time I practiced for myself.

Q. Your three years with Denneson & Hirons?

A. That is right.

Q. What years were those?

A. 1922 to 1925.

Q. With Hogson for how many years?

A. Twenty-five to nineteen thirty-five.

Q. After that you have been practicing on your own?

A. That is right.

Q. That 19—you mean 25 to 35, is that correct?

A. '35.

Q. Will you just describe the work done by Hogson Brothers a little more fully?

A. Hogson Brothers offered complete bank service from sketches, completed plans and construction of banks, finished product.

[fol. 154] Q. They were contractors?

A. Architects, engineers and builders.

Q. What was your position with Hodgson Brothers?

A. I was architect for Hodgson Brothers.

Q. An architect?

A. I came in as an assistant and finally wound up as the architect.

Q. Have you done bank work, practiced architecture for yourself from 1935?

A. Primarily bank work.

Q. How many banks during the course of your entire career in architecture have you designed? Banks that were actually built?

The Court: Designed, or assisted in designing.

Q. Yes.

A. I would say at least two hundred.

Q. By that you understand I mean banks which were actually built?

A. That is right.

Q. You did designing work or participated in it for some two hundred banks?

A. That is right.

Q. Would you state geographically where the banks were?

A. In Hodgson Brothers we did work in I believe forty-two states, and my work was confined pretty much, pretty much, pretty nearly all of them I would say at least twenty-five states.

Q. Have you built banks on Long Island?

A. Yes.

Q. Will you name them?

A. Bayside National Bank, Queens County Savings, Franklin National, Bank of Port Jefferson, Bank of Huntington, First National of Huntington, rather.

Q. Is that under construction?

A. Under construction.

[fol. 155] By the Court:

Q. That means, have you designed?

A. Designed, supervised and gave complete supervision, not only designed, gave complete supervision.

Q. You are not a builder?

A. I am not a builder, but I supervised construction; Federal savings of Farmingdale, Woodside Federal Savings and Sunnyside Federal Savings.

Q. Hamburg?

A. Hamburg Savings.

Q. Queens County?

A. I have mentioned that, Queens County, Little Neck.

Q. Have you mentioned savings and loans?

A. Yes, I mentioned three of them.

Q. What savings and loan associations have you done?

A. Woodside, Sunnyside and Farmingdale.

Q. You have stated you did work for the Franklin National?

A. That is right.

Q. Are you their regular architect?

A. I am doing the eleventh job for them now, so I presume I am.

Q. Beginning when?

A. 1939.

Q. Incidentally, do you know of any architect in the United States who has been architect for as many banks as you have?

A. Well, I don't know.

Q. Modesty aside?

A. I do not know any in this area.

Mr. Rollins: I will concede his qualifications as an expert architect.

The Court: That helps.

The Witness: I do not know of any others locally, there may be elsewhere.

[fol. 156] Q. What did you do at the Franklin National Bank in 1940?

A. In 1939 I did enlarge the first building, the original building on the site now.

Q. Would you just state briefly the architectural, major architectural work which you did for Franklin National Bank?

A. Subsequent to that we did the garden banking at the rear, fixed up the mortgage department in the basement

and in addition, in 1945, at the rear of the building a large major addition and alteration in 1947.

Q. Would you tell the history, please, of what you refer to as a major operation in 1947, starting with your first conversation with anyone connected with the bank, telling us with whom those conversations were and what happened please.

A. Over a period of perhaps four years Mr. Roth and I had discussed the advisability, as well as the means of enlarging the building.

Q. What year was that?

A. I would say from 1942 on until the time that job was actually done.

Q. Go ahead, please.

A. At which time the property was acquired to the west of the building; we enlarged the bank about thirty feet to the west and one hundred fifteen in depth, and then put an entire new third story on the entire bank and partial fourth story.

Q. During these conversations, begin at the beginning, did Mr. Roth tell you what type of addition or alteration or both?

A. Yes. He definitely wanted the new portion to the west he wanted as he called it a department store bank, something radically different, something that would represent sales promotion and display.

Q. During the course of these discussions with him did he mention anything about his concept of a bank?

[fol. 157] Mr. Rollins: I object.

The Court: Sustained. Hearsay.

Q. Did you submit sketches to Mr. Roth?

A. I did, numerous sketches.

Q. Did there come a time when you had gone as far as you felt you could in submitting sketches to him?

A. That is right.

Q. Did you submit a sketch portrayed by this document which I now ask to be shown to you?

A. Yes.

Q. Is that a true representation sketch form of the design you submitted?

A. Yes, I submitted this sketch.

Mr. Grimes: I am going to offer this in evidence at this point.

Mr. Rollins: I am going to object to it; has no probative value in this litigation. It is not the sketch submitted, it is what it is actually today when the acts took place.

By the Court:

Q. Was this developed?

A. The architecture of the wing is entirely different today.

The Court: I think I will receive it in evidence. It shows the evolution of the bank, although it was never put into effect.

Mr. Grimes: Merely for that purpose, sir.

(Paper received in evidence and marked Defendant's Exhibit A.)

[fol. 158] By Mr. Grimes:

Q. Please continue and tell the story of the design of that bank, with the use of that sketch. Then what happened?

A. Mr. Roth was not satisfied with that, he wanted something that was radically different, something of a nature, entirely radical design which I was unable to give him, and that is how Mr. Schoen came into the picture as consultant on that particular room, and for the facade of the building.

Q. Did Mr. Roth comment on the design which is Defendant's Exhibit A?

A. Yes.

Mr. Rollins: I object and move the answer be stricken out, what comment was made on something that never came into being. I ask it be stricken.

The Court: I will have to sustain the objection.

Q. Did Mr. Roth object to this design?

A. He did.

Mr. Rollins: Same motion.

The Court: Sustained. Of course, you have it in the record. Was it ever produced, and he said no.

Q. Did Mr. Roth request any time, any recommendation from you as to obtaining the services of a consultant?

A. Yes, he did.

Mr. Rollins: That is objected to.

The Court: I will have to sustain an objection to a conversation between him and Mr. Roth.

[fol. 159] Mr. Rollins: I ask the answer be stricken out.

The Court: Strike it out.

Mr. Rollins: May I ask the witness be admonished?

Q. Was there a consultant?

A. Yes, there was.

By the Court:

Q. Did you pay him, or the bank pay him?

A. It came out of my fee.

By Mr. Grimes:

Q. Did you check the qualifications of the consultant before he was engaged?

A. I did. Yes, I did.

Q. What qualifications were you looking for as a consultant?

A. Definitely a department store architect.

Mr. Rollins: It is protracting the issues, prolonging this record. We are concerned with conditions prevailing today.

The Court: I think you are right, Mr. Rollins, but counsel has in mind a point that he wants to develop and perhaps we will go along a little bit further on that. But really counsel is right about it. This is somewhat afield.

Mr. Grimes: May I offer proof on this point?

The Court: That consultant has testified, has he not?
[fol. 160] Mr. Grimes: Yes. We called him out of order.

The Court: Yes. He testified. He said all the things that could be said; said he was an expert on banks, and he was brought in for that purpose. He said they wanted a building that looked more like a department store than a bank.

Mr. Grimes: Mr. Schoen's testimony was he had done a large number of department stores. It does seem to me that instructions given by Mr. Roth to this witness would be admissible under the issues of this case, where the charge still is, deliberately making this look like a savings bank. I am offering it on those.

The Court: The instructions would be, but they must come from the lips of Mr. Roth.

Mr. Grimes: I would think, he being a regular architect might state what his instructions were in connection with his engagement.

The Court: No. That would be a direct violation of the hearsay rule; I think the instructions will be received, what instructions he gave to him, I will take, but I think it should come from Mr. Roth. I think, under those circumstances, particularly with that objection, they ought to come from the one who gave the instructions.

Mr. Grimes: Very well. We intend to produce that at a later date.

[fol. 161] By Mr. Grimes:

Q. Had Mr. Schoen to your knowledge, specialized for some years in department store work?

A. Yes.

Q. And he was engaged, and became co-architect with you in the design, is that correct?

A. That is right.

Q. Did Mr. Roth give instructions to both of you, that is you and Mr. Schoen, as to the type of building he wanted?

A. He did.

Q. What were those instructions?

A. Definitely wanted something radically different from a bank, he wanted a department store type bank.

Q. Did you work together with Mr. Schoen?

A. I did, yes.

Q. Mr. Schoen's design was ultimately accepted, is that correct?

A. That is right, it was.

Q. Did you supervise the construction?

A. Yes.

Q. Of the new addition and alteration?

A. The entire job, yes.

Q. Were instructions given by Mr. Roth to you and Mr. Schoen as to the interior, of the type of interior?

A. Yes. He wanted a modern interior, in the vein of a department store.

Q. Were instructions given with reference to merchandise and display?

A. Yes. He wanted displays.

Q. I show you a document and ask you whether this was prepared by you?

A. Yes, that is my idea. I prepared this.

Q. Will you state to the Court what that document is?

A. This is a complete layout of the addition, what we call the westerly addition to the existing building.

[fol. 162] Q. You were in court yesterday?

A. I was.

Q. You saw the pictures that were marked, did you?

A. I did.

Q. You saw what was marked building No. 2?

A. Well, that building No. 2 does not register anything with me at all, because there is no such thing as I know.

Q. I show you exhibit 18 and call your attention to the facade of a building marked No. 2 by the court.

A. Yes, that is the plan of that portion.

Q. You have before you a sketch of the ground-floor?

A. That is right.

Q. Which you have prepared recently?

A. Yes, that was done quite recently.

Q. Is that an accurate sketch of the ground plan of building No. 2 as it is now?

A. As it is now, that is right.

Q. And as it has been for the past year?

A. For the past year.

Q. It has been that way at least since January 1, 1950, is that correct?

A. Oh, yes, even a little prior to that.

Q. Are all the notations on that sketch yours?

A. They are all mine.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: May I look at it? I object to this exhibit on the ground this witness's statement as to the business conducted at the bank is something he knows nothing about, as to present conditions. There has been no proof adduced he knows anything about various departments. He even puts a desk there and chairs. He just describes what type business is being conducted in these various corners.

[fol. 163] Mr. Grimes: There being an objection I merely ask this be marked for identification at the present time.

Mr. Rollins: This is a plan this witness has prepared for the purpose of this trial, upon the existing conditions complained of.

Mr. Grimes: That is correct.

By the Court:

Q. Is it what you saw there when you were there?

A. That exists. Every bit of furniture in there is where it belongs.

Mr. Rollins: There are counters in that exhibit with reference to the type of bank business conducted, something beyond this man's personal knowledge, must have come from information furnished by somebody.

The Witness: I disagree with that. I do know the types of business.

By the Court:

Q. Do you understand the types of business transacted by the Franklin National Bank?

A. I do.

The Court: Your objection does not run to everything here?

Mr. Rollins: No, physical layout I have no objection but his comment as to the fact business was conducted at various parts of that exhibit.

Mr. Grimes: I intend to call another witness as to the type of the business done there, and I will be satisfied to [fol. 164] mark that for identification at the present time. That will shorten the proceeding.

The Court: Mark it for identification for the present.

(Paper marked defendant's exhibit B for identification.)

Q. Mr. Carlson, are you prepared to testify as to the total floor area on exhibit B for identification?

A. I do.

Q. Occupied by what I shall call personal savings alcove?

Mr. Rollins: I object to reading from something not in evidence.

The Court: I will allow the question.

The Witness: I do.

Q. You know the total area of that savings alcove?

A. Yes, I do.

Q. What percentage does that savings alcove bear to the entire ground floor area?

Mr. Rollins: I object to the question upon the ground that the basis of the answer, based upon matters of savings business conducted, is beyond the comprehension and understanding of this witness or his knowledge. He is being questioned about something he doesn't know anything about.

The Court: The question is all right. That is something for you to develop on cross examination. Give us the percentage.

[fol. 165] The Witness: As I recall, it is 14.6 percent of the entire area.

Q. Is devoted to what?

A. To savings.

By Mr. Grimes:

Q. Would you mark on this sketch, please, exactly what portion of the building you refer to?

A. (No answer.)

By the Court:

Q. Will you state what you have done?

A. I have designated the entire savings area with lines and put a red cross in the entire area, and indicated in red the check desks that are used by the savings department. And also the portion of the center desk which is used for new accounts in the savings department.

Q. These which you have indicated are approximately 14.6?

A. That is right, a little under 15 percent. I believe it is 14.6. I have it, indicated right there.

Q. State what your computation shows, please.

A. The large area comprises 594 square feet, and the new accounts portion 56 square feet, which is a total of 14.5 percent of the entire area, total of 650 square feet.

Q. As to that large portion which is marked in red, when was that built?

A. 1948, started in 1947.

Q. Construction was completed about how long after the other portion shown on that sketch?

A. A year and a half, I believe it was.

Q. Would you state what happened in that respect?

A. Well, we acquired the building adjoining the existing [fol. 166] bank at the west and broke a hole through the wall between the two buildings, raised the floor of the adjoining building to the west into which we created a space for I would say approximately half of it which was used for savings and the other half for display purposes.

Q. When that part of the Franklin National Bank was originally built, leaving out the present savings department, where was the savings department when the bank began to do any business in the new addition?

A. It was over on the east side of that large room, in with the commercial work.

Q. Would you please mark on that sketch just where it was?

A. (Indicating.)

Q. In what form, will you describe to the Court, please, did the then savings area consist of? What was it?

A. There were originally three arched windows in the old west wall of the bank, one of which, at the northerly end, was cut through for passage into the newer portion, and the other two arches were transformed into four windows for savings and various types of banking.

Q. In which part of the bank, family or commercial side, did the tellers actually stand?

A. They stood in the original building.

Q. That is, in the commercial side?

A. In the commercial side.

Q. Their windows faced into the family lobby?

A. Into the family lobby.

Q. Was that the situation up until the time when the savings alcove was added?

A. Yes.

Q. That was sometime in 1948?

A. '48, 1948.

Q. I show you a brochure and ask you whether or not this brochure contains pictures of the Franklin National [fol. 167] Bank of Franklin Square, as it is presently called, as regards the original building, the next subsequent build-

ing and various alterations, and alterations up to the time of the completion of what we have called building No. 2 here?

A. Yes, that is it.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: I object to it. It has nothing to do with the present condition of the structure or its appearance to the public.

The Court: What is the purpose of the offer?

Mr. Grimes: The purpose of the offer is in connection with the charge, which is still before the Court, and especially by the amendment yesterday, that we have deliberately embarked on a course of conduct to deceive and defraud the public; also to show especially in connection with that charge that the development of design of this bank was in line with a department store concept, and its natural growth.

The Court: Mark it.

Mr. Rollins: I do not know what subject is being discussed here. Does your Honor take it for everything?

The Court: I will take it for everything.

Mr. Rollins: Including the language in there?

The Court: Yes. If you find anything in the language which is prejudicial, I mean, unduly prejudicial, I will reconsider that particular language, but as I have glanced through it it is just a brochure of a bank, its methods, its [fol. 168] objects, pictures of the interior, trying to give a general appearance of what a bank is, for the purpose, without doubt of attracting people to come to the bank to make deposits.

Mr. Rollins: May I say this in support of my motion? What the intention of the officers or management of the bank was prior to the time complained of, can have no probative force upon their acts.

The Court: What do you mean by the time complained of?

Mr. Rollins: Between 1947 and a date dealing with outright publication, whether the words saving or savings were used.

The Court: Do you make the specific charge in your pleadings that these acts were committed within a certain period? I think you do. Maybe you would know.

Mr. Rollins: Yes, I do. That would be about the year 1947.

The Court: All right. I think maybe your objection is worth considering. We ought to have another question. When was this brochure issued, could we ask the witness that?

Mr. Grimes: I have asked the witness whether that represents the actual architecture——

The Witness: It does, at that time.

By the Court:

Q. When was that brochure published?

A. That was published when that job was completed, as I recall, in 1947.

[fol. 169] Q. Could you say early or late?

A. I believe it was early 1947, around, as I recall, around May of 1947. I think that is the time.

The Court: I will receive the brochure in evidence, because your charge begins along about the year 1947, so any part of the year 1947 would be a proper period in which the defense should be allowed to offer evidence to show its attitude toward the charges made against it by publications, particularly.

(Paper received in evidence and marked Defendant's Exhibit C.)

By Mr. Grimes:

Q. Based upon your entire experience in the field of architecture, and based upon all the designs that you have made as an architect for banks, and based upon your entire study of the subject of architecture, will you express your opinion as to whether the Franklin National Bank as constituted, on the completion of building No. 2 and also upon the completion of the westerly part which we have called the savings alcove, looks like any other bank in the United States?

A. No, it does not.

Q. Whether that bank be a commercial bank or savings bank?

A. It is my opinion, radically different.

Q. From any other bank, is that correct?

A. Yes.

[fol. 170] Cross-examination.

By Mr. Rollins:

Q. When you say radically different from any other bank, you mean physically, is that right?

A. What do you mean by physically?

The Court: Strike it out and start all over.

Q. You do not claim to be sufficiently versed in banking to give an opinion on banking business, do you, which I understand as bank operation, you are not qualified to give an opinion as an expert on banking?

A. Not an expert, no, of course not.

Q. Your expert career and ability stems from the fact you were schooled in architecture, is that right?

A. That is right.

Q. You are not going to deny, are you, this particular bank, Franklin National Bank, concerning which you have testified, looks like a bank?

A. You are talking now about building No. 2?

Q. Physical structure.

A. It does not, no.

Q. Doesn't look like a bank?

A. No, it does not.

Q. So if a person came in the building and looked around at the pictures and structural condition he would think he was in a department store, is that right?

The Court: Wait a minute. You cannot say what that person would think.

Q. You say walking in there and looking at the physical surroundings there you would think it was a department [fol. 171] store?

A. I said it looks like a department store.

Q. Does it look like a bank?

A. No.

Q. Not at all?

A. No.

Q. Has no semblance to a bank at all?

A. No. Of course, there are wickets for tellers.

Q. You would find tellers' windows, would you not?

The Court: Wickets. Physically add that to the witness's answer.

By Mr. Rollins:

Q. Let us take R. H. Macy Company. Did you ever visit R. H. Macy Company?

A. Yes.

Q. That, your associate said, he helped build.

A. (No answer.)

Recess to 2:15 P. M.

AFTERNOON SESSION

Mr. Grimes: I would like to have a conference at the bench.

HAROLD CARLSON, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Rollins (Continuing):

Q. I believe when we adjourned last I asked you whether or not you were acquainted with the physical layout of R. H. Macy & Company in Manhattan, New York City.

A. In general, yes.

[fol. 172] Q. Were you present yesterday when your associate Mr. Schoen said he constructed that edifice?

A. That is right, I was.

Q. You, yourself visited those Macy premises, did you not, from time to time?

A. Yes.

Q. Recent dates?

A. I have been in there time and again.

Q. You know the physical layout of the ground floor of the store premises?

A. In general.

Q. Did you ever see a wicket of a teller's cage similar to that in the Franklin National Bank?

A. Yes, in all refund departments.

Q. On the ground floor?

A. I believe there is one on every floor.

Q. You are sure of this? This is on the ground floor?

A. I think there is one on every floor, Macy's which is a department wicket.

Q. How big would you say the cage is?

A. I never measured, I have no idea. Big enough so one person can conveniently work in it.

Q. A little cage?

A. That is right, with a window in it.

Q. Like a ticket window of a railroad station?

A. No.

Q. Do those cages have signs, for savings account over the window?

A. I don't believe I saw anything like that in it.

Q. Does the word, saving or savings, over a window in any establishment indicate anything to you?

A. Yes.

Q. What does it indicate to you?

A. Savings window.

Q. If you found a number of them in an establishment would it not lead you to believe there was a savings [fol. 173] bank?

A. No, it would not. It would indicate savings in that particular portion of it.

Q. You mean just savings or what?

A. Savings account.

Q. Savings account would not indicate to you it is a bank of some kind?

A. That is right.

Q. It would indicate it was a bank?

A. That portion of it, yes.

Q. Is it not passing strange with respect to the reason that a corporation engaged in the banking business should want its establishment not to look like banking business?

Mr. Grimes: I object.

The Court: Argumentative. I will have to sustain the objection.

Q. You were ordered to build a bank, were you not?

A. I think I made myself clear.

Q. Were you not hired to build a bank?

A. I was hired to build—

The Court: Just answer yes or no.
The Witness: No.

By Mr. Rollins:

Q. You were hired to build a——

The Court: You are using the word, build. Design.

Q. Were you hired to design a bank of some sort?

A. For whom?

[fol. 174] Q. For the defendant in this case, building No. 2, exhibited in Exhibit 18?

A. No.

Q. Were you hired by the defendant to design a department store? Yes or no?

A. I don't understand the question.

Q. Were you hired?

A. (No answer.)

The Court: You can say yes or no or I cannot answer that.

The Witness: All right. I cannot answer it.

By Mr. Rollins:

Q. You cannot answer whether you were hired by the defendant to design——

The Court: He cannot answer yes or no.

The Witness: Yes or no, I cannot answer.

Q. You were hired to design for the defendant a bank or portion of a bank building for the operation of a bank.

The Court: That is not the question. The last question was, were you hired to design a department store.

Q. Were you hired to design a department store?

A. No.

Q. You knew that the defendant, Franklin National Bank was a banking institution, did you not?

A. Yes.

Q. They were engaged exclusively in the banking business at those premises?

A. Yes.

[fol. 175] Q. They knew you were a specialist in construction of banks?

A. That is right.

Q. Your associate, Mr. Schoen, whom you recommended, was also a specialist according to his and your statement? He, too, was a specialist as an architect in designing banks?

Mr. Grimes: I object to that, contrary to the record.

The Court: I will allow him to answer. Is that correct?

The Witness: Partially so, yes.

Q. Don't you consider yourself a specialist in the construction of banking institutions?

A. That was not the last answer. You asked me about Mr. Schoen.

Q. I am asking about yourself.

A. I do, yes.

Q. That is your specialty?

A. More or less, yes.

Q. When persons hire you, they hire you as a specialist to construct a bank?

A. That is right.

Q. And Mr. Schoen, according to your knowledge, is also a specialist in the construction of banks, is that not right?

A. No, he is not a specialist in banks.

Q. Were you here yesterday when he said he was?

A. I was. He did not say that.

Mr. Grimes: I object.

The Court: Sustained. Strike it out.

Q. To your knowledge did the Franklin National Bank now or any other time ever sell any merchandise?

A. No.

[fol. 176] Were you told by Mr. Roth when you were there to construct this addition, that is No. 2 on Exhibit 18, that he intended to use it for his banking business?

A. (No answer.)

Q. The defendant banking business, I should have said.

A. Banking business, yes.

Q. When you said that the portion occupied by the defendant for its savings deposits or business was limited to 14.6 percent, did you take into consideration merely that

portion leading from the entrance to the cages or wickets as you called them?

A. No, that is thrown into lobby.

Q. You did not take that into consideration?

A. I took in consideration a percentage of the lobby which is used by everyone.

Q. When you are talking about the savings account department did you take into consideration the lobby as you term it?

A. No, because it is not used for savings.

Q. Did you take into consideration the aisles leading from the various departments in building No. 2 shown on Plaintiff's Exhibit 18?

A. What aisles? I don't know what you mean by aisles.

Q. Let me show you this. I show you Exhibit 28 and I ask you did you take into consideration that front part leading from the street?

A. No, that has nothing to do with savings.

Q. In other words, you have to pass a so-called lobby before you reach the savings department?

A. That is right.

Q. How many square feet would you say that was?

A. I have it on my drawing, whatever it is.

Q. May I have this drawing? Will this paper help refresh your recollection?

A. Yes. The entire lobby area of the entire space, of the [fol. 177] area back to the rear occupies 21.8 percent of the entire floor area.

Q. So if you add that to the 14.6 it would give you more than—

A. (Interrupting:) Why should you do that?

Q. In other words, you attempted to pro-rate it?

A. Exactly. That is the only way you can do it.

Q. That is how you arrived at 14.6 with reference to the savings account department?

A. I don't understand the question. How did I arrive at that?

Q. Tell the Court how you arrived?

A. Exactly as I have indicated on this drawing.

Q. Tell us how, without referring to the drawing, the actual space was allocated to the savings department?

A. Four feet all around the savings department windows, plus the check desks, a portion of the new accounts desk as I have indicated on this drawing.

Q. Did you make any allowance for aisles leading from the front entrance?

A. No.

Q. Or leading to various other departments in the family lobby?

The Court: If the witness would use the word, exclusively, then you and he will understand one another. 14.5 is the space devoted exclusively to savings accounts?

The Witness: That is right.

By Mr. Rollins:

Q. Actually occupied by teller windows and wickets?

A. And four feet around for the public to operate, enter corridors or aisles.

[fol. 178] Q. What is the entire area of that section in square feet of building No. 2 shown on Plaintiff's Exhibit 18? That is of the ground floor, I mean, length of this building.

A. I can total it up here easily enough.

The Court: Write it right on there and we will have it then. Put on the record the witness is noting on Exhibit B for identification——

The Witness: 44.65 square feet.

Q. Can you state by looking at Exhibit 21 whether or not the representation there shows in any respect that it looks like a department store?

A. This has nothing to do.

Q. Does that?

A. No. That looks like a bank.

Mr. Grimes: No further questions.

AUGUSTUS B. WELLER, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 190 North Hewlett Avenue, Merrick, New York.

Q. What is your occupation?

A. Bank president.

Q. What bank?

A. Meadowbrook National Bank.

Q. Where is that located?

A. We have three offices, in Freeport, Merrick and West Hempstead.

[fol. 179] Q. All in Nassau County?

A. Right.

Q. Where did you receive your education?

A. In Yale.

Q. What year?

A. 1915.

Q. What degree?

A. B. A.

Q. Did you major in some subject there?

A. I majored in economics.

Q. What did you do after your graduation from college?

A. I spent twelve years in the investment banking business.

Q. Where?

A. With various concerns in New York City; about three years in the advertising business.

Q. Where was that?

A. In New York City.

Q. After that, what did you do?

A. I accepted an engagement with the First National Bank of Merrick at that time.

Q. In what capacity?

A. As president.

Q. What year was that?

A. July, 1934.

Q. You have been president since that time?

A. That is right.

Q. The name of that bank was changed to the Meadowbrook National Bank?

A. That is right.

Q. The bank merged with other banks?

A. That is true.

Q. Have you served as an officer of the Nassau County Clearing House Association?

A. I have.

Q. What office have you held?

A. I have been a director of the Clearing House on several occasions, and I have been vice chairman, also chairman of the Clearing House Association.

Q. Would you describe briefly to the Court what the Nassau County Clearing House Association is?

A. It is an association of commercial banks in the County, [fol.180] commercial banks and savings banks in the County. The Clearing House function as generally understood, is not conducted actively at the present time. However, we do clear credits in the County, in fact, all of the loans that are made by commercial banks in the County are reported, as far as borrowers' names are concerned, and cleared with other banks in order to prevent duplicate borrowing. We maintain quite an organization for that purpose.

Q. Are all of the banks in Nassau County members?

A. No.

Q. What banks are members?

A. There are forty-nine in the County. Only two are not members.

Q. Forty-seven of the forty-nine are members, is that correct?

A. That is right.

Q. That includes one savings bank in Nassau County?

A. It does include a savings bank, yes.

Q. Would you say what that savings bank is?

A. Roslyn Savings Bank.

Q. Located?

A. In Roslyn.

Q. Did you state the position which you held in the Nassau County Clearing House Association?

A. I have been Chairman of a number of committees, if that is of interest, nominating committee, budget committee, I guess, well, a service charge committee, savings and loan associations committee, probably some others of less importance.

Q. You were Chairman of the Clearing House Association in 1940?

A. That is right.

Q. Are you a Director at the present time?

A. No. My directorship ceased at the termination of 1950.

[fol. 181] Mr. Rollins: I suggest the witness is qualified. I will call him as an expert.

Mr. Grimes: In bank matters?

The Court: I will have to hear the question.

Q. Is there competition in Nassau County for deposits of money between banks, banks paying interest on that money?

A. Yes, indeed.

Q. How would you characterize that competition?

A. Very intense.

Mr. Rollins: I object to the statement by this witness as to characterization. Only a question of competition. The Court can take judicial notice, nobody is engaged in business except for profit.

The Court: I think I will allow the question.

By the Court:

Q. Would you say keen?

A. Very intense.

By Mr. Grimes:

Q. Is there competition between commercial banks in Nassau County and banks elsewhere, other than in Nassau County?

A. Yes.

Mr. Rollins: Dealing with the same class of business, commercial business. Is the question restricted only to that?

The Court: It is not restricted at all. It says do commercial banks in Nassau County compete with other commercial banks anywhere. The answer is yes.

[fol. 182] Q. In what way do they compete with banks outside of Nassau County?

Mr. Rollins: May the record show, whether a commercial bank or any other institution.

The Court: Is this commercial? The witness has not indicated he has been identified with a savings bank as such at all. Have you?

The Witness: No.

By the Court:

Q. You are speaking exclusively about commercial banks now?

A. That it right.

By Mr. Grimes:

Q. My question, sir, I will re-phrase the question again. Withdrawn.

Q. Is there competition between National banks in Nassau County and banks of any other character outside of Nassau County?

A. Yes.

Q. Would you state what that competition is? In what way they compete?

A. They compete, of course, for commercial accounts, but they compete also for savings accounts.

Q. With what character of banks outside of Nassau County do commercial banks in Nassau County compete?

A. With savings banks in particular.

Q. You are confining your answer with respect to deposits of money, is that correct?

A. That is right.

Q. Is there also competition between commercial banks [fol. 183] including National banks in Nassau County, and banks throughout New York State?

A. Yes, I would say so.

Q. That also is in respect of competition for deposits, is that correct?

A. For deposits, yes.

Q. You state you have been in the advertising business during the course of your career?

A. That is right.

Q. By the way, is there competition between National banks in Nassau County and savings and loan associations?

Mr. Rollins: I object to that question. He would not know.

The Witness: Oh.

Mr. Rollins: Besides, there could not be any such competition under the decision, because they are a different class of banks.

The Court: I will allow it.

The Witness: Competition is particularly extreme between commercial banks in the County and savings and loan associations.

Q. Will you state in what way?

A. For time deposits, savings accounts. Competition, do you mean by what means?

Q. Yes, by what means.

The Court: That is an answer. That is another question.

The Witness: By means of solicitation, particularly through advertising, circularizing.

Q. Do most savings and loan association advertise?

A. They do, very extensively.

[fol. 184] Q. What rate of interest do they advertise?

A. They advertise in Nassau County from two to two and a half percent.

Q. Savings banks advertise?

A. Not to as great an extent; there is some advertising.

Q. Do savings banks in New York City advertise in Nassau County?

A. Yes, quite extensively.

Q. In that respect are they in competition with your bank?

A. Of course.

Q. Does your bank feel that competition?

A. Yes, of course we do.

Q. In advertising, that is to say when banks or financial

institutions of any character, advertise for people's deposits and offer to pay interest on those deposits, what terms are used?

A. I would like the first part of that question, if you don't mind.

Q. In advertising, that is to say when banks or financial institutions of any character advertise for people's deposits and offer to pay interest on those deposits what terms are used?

A. The commercial banks in the County are using the terms of special interest deposit or thrift deposit or compound interest deposit, while the savings banks and savings and loan associations emphasize the word savings, of course.

Q. During the course of your entire experience in finance and advertising, have you, especially as president of a bank, Meadowbrook Bank, formed an opinion as to the effect in dealing with the public and in competing with other banks for their deposits, as to use of these four words?

A. A very definite opinion.

[fol. 185] Q. What is your opinion?

Mr. Rollins: Objected to. It is not in the capabilities of this witness to answer and speculate as to what may be in the public's mind.

The Court: I think I will allow the answer.

The Witness: The words thrift special interest, or compound interest, are absolutely futile in appealing to the public to indicate what the word savings, would indicate with respect to savings accounts, and not only do not produce results, but they are in my opinion entirely misleading. I do not think they convey to the public, or even to those of us who work in banks, the sense of what they really mean. We are trying to indicate the meaning of the word, savings in a savings account, by using other terms which do not at all indicate what the account is.

The Court: Before you leave that, will you move to strike it out and I will reserve—

Mr. Rollins: I move to strike out the witness's answer.

The Court: I will reserve decision on that motion.

Q. What is the source of and the basis of the opinion which you have expressed?

A. My opinion is predicated upon the hundreds of contacts I have had with people dealing with our own institution, and with others.

[fol. 186] By the Court:

Q. Sum it up. In your own experience?

A. My own experience in dealing with those people and their comments.

By Mr. Grimes:

Q. Will you give to the Court your opinion of the utility and effectiveness in dealing with the public and depositors in the use of the word, savings?

Mr. Rollins: I object.

The Court: I think I will have to sustain that. The Court will have to use its own knowledge as to the effect of that word.

Q. Might I ask this question. Have you formed an opinion as to the public knowledge and understanding of the word, savings?

A. Yes.

Mr. Rollins: Objected to.

The Court: I will allow that much. He says yes.

Q. Is that opinion based on your many years' experience in banking?

A. Yes.

Q. Will you state to the Court please, what your opinion is?

Mr. Rollins: Objected to.

The Court: What is the rest of that question? Is as to that? As to the effect of the word, savings?

[fol. 187] Mr. Grimes: Yes, and the knowledge people have of the meaning of the word, savings, and its effectiveness in dealing with the public.

The Court: That is too great a division. One is his knowledge, and then the other is the knowledge of the general public.

Mr. Grimes: His knowledge and the public's knowledge.

The Court: Did you want his own knowledge of the use of the word savings? I shall allow that. Divide the question.

By the Court:

Q. The question is to give your knowledge of the effectiveness of the word savings to attract deposits? Is that it?

Mr. Grimes: Precisely.

The Court: I will allow that question.

The Witness: The word savings, if used would attract many more depositors. The word, special interest account as we use the word, does not attract the depositor.

Q. That is your experience?

A. That is my experience.

Q. From the standpoint of bankers and depositors, is there any difference between savings account and thrift account, compound interest account and special interest account?

A. There is no actual difference in the account itself, no.

Q. Each is an account in which people deposit money with a bank, and on which they receive interest?

A. That is right.

[fol. 188] Cross-examination.

By Mr. Rollins:

Q. Following the last answer, in other words, all deposits in the nature of savings which bear interest are called time deposits?

A. They are included in the time deposit category in a bank.

Q. That includes savings?

A. That includes savings.

Q. That only deals with all banks, is that right, where the term time deposit is used to distinguish that account from a man's deposit in a commercial account?

A. Yes.

Q. By demand deposits, are those payable on check?

A. That is right.

Q. How old is the Meadowbrook Bank?

A. It was established in 1905.

Q. What County?

A. Nassau County.

Q. Any particular township?

A. In Freeport.

Q. How many branches has that bank?

A. Two, main office and two branches.

Q. Where are they located?

A. One in West Hempstead and one in Merrick.

Q. The one in West Hempstead, when was that acquired by the Meadowbrook Bank?

A. In March, this last year, 1950.

Q. When was the one in Merrick?

A. Merrick was really the parent bank which was merged with the First National Bank & Trust Company of Freeport in November, 1949, and that was then made the main office.

Q. How many depositors, that is savings accounts depositors has your bank, the Meadowbrook, today?

A. I would estimate approximately 8,000.

Q. When did you join the bank?

A. In 1934.

[fol. 189] Q. How many accounts did it have then, the bank?

A. It would be rather difficult for me to say but I judge about 2,000 at that time.

Q. How many were the deposits, total deposits in savings accounts of the Meadowbrook, which is the old name, or any other name when they had those 2000 depositors?

A. The savings accounts in those days totaled twice the volume of demand accounts.

Q. How much in dollars and cents, approximately?

A. Well, I can estimate the First National Bank of Merrick rather closely; in those days that was approximately \$500,000, \$550,000, something like that.

Q. In dollars?

A. In dollars.

Q. How many depositors did you say you have today? 8000?

A. 8000, yes.

Q. How many does that mean in dollars and cents?

A. Bringing in the three offices, which were originally

three independent banks, the total today is approximately twelve million.

Q. Did you change any media of advertising to obtain those additional accounts?

Mr. Grimes: I object to that.

The Court: I allow it.

Mr. Grimes: The testimony is incompetent, irrelevant and immaterial.

The Court: I allow it.

The Witness: The substantial increase was obtained principally through the merger; the advertising was pretty much the same; we may have done more advertising. The general type was not changed.

Q. Did you use newspaper advertising in Nassau County [fol. 190] to advertise your thrift accounts?

A. No.

Q. Thrift department?

A. No. We used newspapers, but the mention of special interest account is incident in the ad., we do not advertise for them, they are very ineffective.

Q. What language did you use in those advertisements?

A. Personal loan, is what we offered, any personal loan, F. H. A. loans, mortgage, that type business.

Q. Did you ever advertise for your savings account in the same language? .

A. No.

Q. Never sought a compound interest account?

A. No.

Q. Never advertised, advising the public you had a savings department?

A. In our institutional ads. we offered that as a service; we say, special interest accounts.

Q. Did you let that department be known by a circular at all of any kind?

A. No.

Q. When you say, institutional advertising, what do you mean?

A. Institutional advertising is where——

By the Court:

Q. That is for the whole bank?

A. Yes, entire bank, you build the dignities of your banks.

Q. Did you have circulars published at all?

A. Oh, yes.

Q. With any circulars? In your commercial department you issue financial monthly statements to check depositors, depositors on demand accounts?

A. We send them statements, yes.

Q. Do you also enclose a circular saying you have——

A. (Interrupting): We never enclose a circular specializ-[fol. 191] ing that one department. We have mentioned this among others.

Q. Each monthly statement?

A. Now and then, not each monthly statement.

Q. How often would you do that?

A. I would think quarterly perhaps.

Q. In what proportion, that is, dealing with your commercial accounts and your savings accounts, does your bank have deposits?

A. In proportion of each?

Q. Demand deposits, time deposits, and commercial deposits as of today?

A. As of today our demand accounts are about 110 percent of our savings accounts.

Q. In dollars and cents?

A. That is fifteen million in demand, I am speaking of individual demand accounts, not public funds, fifteen million of demand and twelve million savings accounts. That is today.

Q. How was it last year?

A. Last year we were just about even.

Q. In other words, demand accounts are increasing much more rapidly than savings accounts? How much was demand accounts approximately?

A. Last year demand accounts I would say were about thirteen million.

Q. What were time deposit accounts, savings bank?

A. Time deposit accounts I would say were around approximately eleven.

Q. Today they are?

A. Twelve in savings.

Q. How about 1948? What was the amount in dollars and cents of commercial accounts, demand accounts and those of the savings department or special interest accounts?

A. You are getting back a little far. I would rather answer in percentage. I don't remember exactly totals.

[fol. 192] Q. Approximately, more or less?

A. I have another little problem. I would have to reconcile deposits in three different units, but I would say deposits have increased in our demand accounts, have increased probably twenty to twenty-five percent., and in our savings accounts perhaps ten percent. over that period, I mean since 1948.

Q. In 1950, as of today, there is an increase of savings accounts in amount and number.

A. Totally out of proportion to the others; it is really practically a loss.

Q. We are talking now about special interest accounts. Would you say in the last five years there has been an increase in your bank as to number of accounts in special interest accounts?

A. Yes.

Q. About what increase would you say?

A. Last five years over all increase would be within fifteen percent.

Q. The number?

A. I am thinking of dollars. You have been talking of dollars.

Q. Talking about dollars, about fifteen percent?

A. Yes.

Q. How many in number of accounts?

A. That I could not tell you.

Q. How many savings banks are there in Nassau County?

A. One.

Q. How many commercial banks are there?

A. Forty-nine, I think, or forty-eight, forty-eight I believe, maybe forty-seven.

Q. What is the name of the savings bank?

A. Roslyn Savings Bank.

Q. You feel the Roslyn Savings Bank is in competition with the other forty-six commercial banks, included in which [fol. 193] is the Franklin National Bank and yourself?

A. Do I have to answer that yes or no?

The Court: No. Say you cannot answer it yes or no.

The Witness: That bank does give us competition, but the real competition is from New York banks and savings and loan associations.

Q. To your knowledge, most National banks have prospered during the last ten years, have they not?

A. Yes.

Q. Have they prospered considerably?

A. I think that is a question, is it not, that deserves comparison? I don't know what you mean by considerably.

Q. Answer it any way you want.

A. I would say that they have not prospered considerably in proportion to savings banks.

Q. How about their own banks?

A. They have made a profit, yes.

Q. A substantial profit over the years?

A. I should say in the last five years if they made a substantial profit over the preceding years?

Q. That is right.

A. I do not think our ratio of profit in our own bank has been so substantial. In proportion I think it ran about the same.

Q. How about the other forty-six commercial banks? What is your opinion with respect to the five years ending 1950 with those of preceding years?

A. I think in the last fifteen all banks have done well and their profits have been in proportion right along.

Q. In proportion to what, in percentage?

A. Well——

[fol. 194] Q. Would you say it has tripled in the last five years?

A. Tripled?

Q. Yes.

A. Oh, no.

Q. Would you say, doubled?

A. No.

Q. What percentage would you say within five years last past in comparison with the five years prior thereto?

A. Taking our County as a whole, all those banks, it would be my own opinion, without immediate verification of figures that profits have been consistently the same over the past ten, twelve years.

Q. You mean they have not made more one year than a prior year?

A. They may have made more one year than a prior, but I am taking it over the entire period.

Q. Would you say 1949 was a very profitable year for banks in Nassau County?

A. Yes.

Q. 1948?

A. Yes.

Q. 1947?

A. Yes.

Q. 1946?

A. Yes.

Q. 1945?

A. Yes.

Q. 1950?

A. Yes.

Q. In other words, National banks did a thriving business in Nassau County, did they not?

A. They did very good business, yes.

Q. You know, do you not, that commercial banks make investments that savings banks may not, under the law.

A. Well, yes.

Q. A savings bank cannot make an investment on loan money on a business deal such as—

The Court: Are you not getting a little far afield?

Mr. Rollins: I withdraw the question.

Q. People come to your bank knowing you have a savings department, do they not?

[fol. 195] The Court: Wait a minute. How can he tell us what people know?

Q. They come and ask?

A. (No answer.)

Q. Do they come in and ask whether you have a savings department?

A. They do.

Q. You are acquainted with the National City Bank?

A. Yes.

Q. They designate their saving department by the words, thrift account?

A. Perhaps, I would not know.

Q. How about Chase National?

A. I would not know.

Q. Do you know whether they do a good business in their savings department?

A. No, I do not. I am not familiar.

Mr. Grimes: I object.

The Court: Allowed. He said he does not know.

Q. You feel your bank is a successful National bank?

A. Yes.

Q. Do you feel it hampered in any way as a bank?

A. Yes.

Q. You mean only because you feel it would be more convenient to your bank if you were permitted, without restraint to advertise by using the word, saving or savings?

A. That would be very important.

Q. That would increase your business, you feel?

A. Oh, yes.

Q. That is the only reason why you feel your bank would make more money than it has?

A. I may have a lot more.

[fol. 196] Q. I am talking about that; that is the only stumbling block?

A. I will not say that is the only one; that is a stumbling block; I mean, it would be convenient if it were not there. It would be very helpful.

Q. You don't want this Court to believe you lend evidence except to help your situation, that is, of your bank as a disinterested witness?

A. Well—

Q. You are interested in the outcome of this case?

A. Yes.

Q. You are not getting paid for coming here?

A. No.

By Mr. Grimes :

Q. During the past five years have all banks and financial institutions prospered?

A. Yes.

Mr. Rollins: I move the answer be stricken out. I can understand he would know about Nassau County.

The Court: I will allow it. He has general knowledge. He is in the banking business.

Q. What about savings banks?

A. They have prospered particularly.

Q. Would you say more than commercial banks?

The Court: It does not matter to me whether they did well or did not do well. I will have to sustain the objection, whether they did a good business or not. I am not interested.

[fol. 197] By the Court:

Q. What do you mean by the expression, Clearing House? Just a minute. Why do you not want him to define that?

Mr. Grimes: I would like to know whether they helped each other or not.

The Court: I granted him permission to question the witness about the Clearing House situation, and I did not do it very properly, I am sure.

Q. What do you mean by Clearing House Association? What is the function of that association?

A. Clearing House Association was established during the depth of the depression and at that time arranged clearances between the local banks which made it unnecessary to transmit all items through New York clearing arrangement, and our New York correspondents. As conditions improved, however, that particular clearing function has grown more and more into disuse; I believe some banks do clear directly through arrangements with the Clearing House, but the real purpose of the Clearing House today, and its principal function is the clearing of credit information; I think they have, in fact, I know they have, over five hundred thousand names in their credit files, and when we have a loan application we call the Clearing House immediately, that is all

members of the Clearing House call immediately to obtain information on that particular name, and we may find he is a borrower in other banks, or has a judgment or a record of that kind; very important function.

[fol. 198] Q. It is a private business institution of bankers doing business?

A. It is an association of bankers doing business in Nassau County.

Q. And was born during the time of the depression to help one another through liquidation of loans?

A. Yes, it was.

Q. You say that function has since become unnecessary?

A. It is not used as actively as it was at that time.

Q. Is it used at all?

A. Yes, I think so.

Q. When was the last time?

A. That I would not know.

Q. How long have you been Chairman of the Board of Directors?

A. That is routine operation.

The Court: He only gave that as an indication of his education in banking.

Mr. Rollins: I want to find out, since banks have prospered, that is another thing they cannot impair, National function, since your Honor let that in, I want to show that has not become necessary. These fellows have prospered.

The Court: Maybe you did not hear, but that was just one feature that had not become necessary, that is clearing through this organization. Generally speaking, the witness said, they go back to the old form and clear their checks through the Clearing House of New York, correspondent banks which, in turn, go through—

By Mr. Rollins:

Q. You could have done that before your association if you had sufficient assets to back up your—

[fol. 199] A. (Interrupting) Assets had nothing to do with what I am talking about.

By the Court:

Q. They did do it before?

A. Yes.

Q. You returned to that method of doing business generally now?

A. Yes.

By Mr. Grimes:

Q. You said for the past five years time deposits of your bank had increased approximately fifteen percent?

A. I would say so, yes.

Q. To what extent did demand deposits increase during that same period of time?

A. I would say about fifty per cent.

Q. When people come into your bank and ask you, as you testified on cross examination, whether you have a savings department, what do you tell them?

A. Well, it is rather an awkward thing to explain, just what we do have. Of course, we tell them we have the same thing as the savings department, although it is called a special interest department; we explain to them it is the same thing. When that is not carefully explained to them, however, they seem to feel they are not doing business with a savings account, and in fact, and we have withdrawals where people explain to us when we ask them why are they withdrawing their money, they decide they need to put the money in a savings institution; that we do not have that type of service.

Q. You find a great deal of misunderstanding of what the words special interest—

A. (Interrupting) It is not understood at all.

[fol. 200] Q. (Continuing)—the word savings is?

A. Very clearly.

By Mr. Rollins:

Q. When you explain that to them, do they walk out?

A. Yes, very often.

Q. How many have you had in your career?

A. How many? Well, I cannot tell you the number. I bet I have had twenty-five or thirty.

Q. How many years?

A. In seventeen years.

Q. Could you give me the name of one who walked out?

A. Yes.

Q. Give me the name.

A. Shall I expose that name here? If it is all right, I mean.

Q. Give the name and address.

A. I don't know if I can give you the address, the lady lives in Bellmore; her name is Doux.

Q. When was that?

A. About two years ago.

Q. Have you got any other name?

A. Let us see now, yes, I will give you one, I don't remember his first name, last name is Hefflein.

Q. When was that?

A. I would say that was along about the same time, three years ago, something like that.

Q. Are they related to you?

A. No.

Q. Did you have any law suits with them?

A. No.

By Mr. Grimes:

Q. What happened with that?

A. She——

Q. Doux.

The Court: We have that. Those were the people to whom he made the explanation, and they walked out.

Mr. Grimes: No further questions.

[fol. 201] WILLIAM H. ABEL, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 460 Macatee Place, Mineola, New York.

Q. What is your occupation?

A. I am president of the Central National Bank, Mineola.

Q. How long have you been president of that bank?

A. Since the 9th of this January. Prior to that I was executive vice president for five years.

Q. How long have you been in the bank?

A. Twenty-eight years.

Q. Always with the same bank?

A. No. I started upon leaving high school, started with the National Park Bank in New York, 1923; that bank is now part of the Chase National Bank, and I believe it is the latter part of 1925 I joined the staff of the First National in Mineola as bookkeeper, and was advanced to teller; left there in 1930 to take a position with the present Central National Bank as assistant cashier, and thereafter, 1937 I was promoted to cashier and in 1945 to executive vice president, and that brings you up to date.

Q. Have you made a special study of banking?

A. I have. I have taken numerous courses in the American Institute of Banking. I am a graduate of the graduate school of banking at Rutgers, and a number of special courses at N. Y. U.

Q. Does your bank compete with other banks?

A. Oh, yes.

[fol. 202] Q. How?

A. In the solicitation of loans, deposits and the sale of our general services.

Q. What type banks do you compete with?

A. We compete with other commercial banks in the area, savings and loan associations and savings bank in New York City and Brooklyn and New York.

Q. Does your bank advertise.

A. Yes.

Q. Do most banks advertise?

A. I believe so.

Q. Are you in competition with these other banks you have mentioned for deposits of money on which you pay interest?

A. Yes.

Q. How would you characterize the competition?

A. It is very keen.

Q. Is advertising in your observation of banking insti-

tutions, Nassau institutions for people's deposits of money, on which interest is paid, on the increase?

A. I think competition is becoming keener all the time.

Q. Advertising business increasing all the time?

A. Yes.

Q. Will you tell the Court about the type of competition you receive from savings and loan associations?

Mr. Rollins: I object, incompetent, irrelevant and immaterial.

The Court: Allowed.

The Witness: The history of Nassau, and I believe a lot of other counties would probably prove the savings and loan associations have been increasing rather rapidly, both the State chartered savings and loan, as well as the Federally chartered savings and loan associations.

[fol. 203] Q. Is that your best recollection?

A. They have made vast strides over the past ten, twelve years.

The Court: The question I allowed is, were you in competition with savings and loan associations in Nassau County.

The Witness: We are.

By Mr. Grimes:

Q. In what manner are you in competition with savings bank wherever located?

Mr. Rollins: Objected to, irrelevant, incompetent and immaterial.

The Court: I allow it. You are just calling for characterizing the degree of competition.

Mr. Grimes: Yes.

The Court: I allow it.

The Witness: The reason we are in competition is because—

By the Court:

Q. Is it small, large?

A. Tremendous.

By Mr. Grimes:

Q. Are you familiar with the terms used by financial institutions when they advertise for accounts of people, and offer to pay interest on the deposit?

A. Yes, I am.

Q. What words are used?

A. Special interest, thrift, compound interest accounts, [fol. 204] and in savings banks or savings and loan associations they are permitted to use the word, savings.

Q. In giving the answer you have given, you understood I was asking you, when I asked you about competition, that I meant at all times competition for deposits on which you pay interest.

A. That is right. I answered the question in line of general competition.

The Court: Some of the questions were beyond that. He answered that.

Q. Perhaps I was not specific. In connection with competition you have with savings banks. I wish you would give that. When I ask that question I wish you would now give the answer with special reference to competition for deposits. How would you characterize that competition?

A. On deposits for which we pay interest?

Q. Yes.

A. It is also very keen.

Q. You named four words which are used in advertising for people's deposits by financial institutions.

A. That is right.

Q. Based upon your experience in dealing with the depositors have you formed an opinion as to the usefulness and efficacy of those four words when used by financial institutions in advertising?

A. Yes, I have.

Q. What is it?

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial, and not germane to the issues.

The Court: You used that expression before, those four words. Which four and what do you mean specifically by that?

[fol. 205] Mr. Grimes: Relative merits of the words, savings, compound interest, special interest and thrift.

The Court: Four expressions would be better. I allow the answer, yes or no.

The Witness: Yes, I have.

Q. What is that opinion?

Mr. Rollins: That is objected to.

The Court: I allow it. Move to strike it out.

The Witness: I feel we operate under a very heavy handicap.

Mr. Rollins: I move the answer be stricken out as a conclusion, handicapped, encompasses a lot.

The Court: Opinion would be a conclusion, but I agree with you he has not answered the question, unless you go on from there.

The Witness: May I explain that?

Q. What is your opinion of the efficacy in the use of those three expressions, thrown into one group and, one savings.

A. All expressions commonly used in commercial banks are not generally understood by the public; the word savings is, and we frequently have difficulty with it. Does that answer the question?

Q. So that you would say that the restriction on your using the word, savings, is detrimental?

A. Yes.

Q. Advantageous, or what?

A. It would be advantageous if we could use, it is detrimental if we cannot.

[fol. 206] Q. The using of those substituted expressions, would say that is inadequate for the purpose?

A. It puts us under a hardship, and if I could explain that a bit further, I would like to. We frequently have people come to the bank and they will tell one of the tellers they would like to open a savings account; my tellers have been instructed to direct such people to an officer; most times we are able to sell them on the idea of accepting what we have, in some cases we are unable to do so.

Mr. Rollins: I move to strike out the last part.

The Court: I have to grant that motion. Hearsay.

Mr. Rollins: I move to strike out the entire answer.

The Court: Have you finished that opinion?

Q. Will you go on with your explanation?

A. Judge, some people are so used to the word, savings.

The Court: You lost the thread of your answer. You were treating with the efficacy of the expression, thrift account, special interest account, compound interest account as compared with using the word, saving or savings, to express those same ideas. The question was, what in your opinion the difference was, if any.

A. There is no difference in the type of account. They are handled the same way, and we pay interest on them; [fol. 207] you must present your passbook and for withdrawal the same as the ordinary savings account.

Q. How about the effect on the number of depositors you have by using those three expressions, and not being allowed to use the words, saving or savings? Could you give your opinion on that?

A. There, your Honor, it is just an opinion; I have no facts to support my opinion. I think we have lost some business, how much I do not know.

Mr. Rollins: I move that answer be stricken out, because it is speculative, we lost some business. Nothing on which it can be based.

The Court: I will let it stand.

Mr. Rollins: I want to submit all this is speculation.

The Court: I am going to reserve decision on your motion. I said so before.

By Mr. Grimes:

Q. If I understand you, it is a hardship?

A. That is correct.

Q. For you not to be able to use the word, savings, is that right?

A. That is correct.

Q. Can you be more specific about the opinion which you just expressed?

A. Just—

Mr. Rollins: I want the record to show I am not making objections, at your Honor's suggestion, but I make a motion to strike it out.

The Court: That will preserve the record.

[fol. 208] The Witness: As I told you before, we frequently have people come to the bank and ask to open a savings account. We have to tell them we do not have it.

Mr. Grimes: I withdraw the question.

Q. Can you state to what extent it is a hardship in your opinion?

A. The same problem comes up almost daily at least three times a week I would say.

Q. By that you mean people do not understand any word except the word savings?

A. That is right. We have a lot of people come out from the City, older folks.

The Court: Wait a minute. Do not go into specific instances. You are giving specific opinion. That is a conclusion of your own, that is all.

The Witness: We have a lot of people come out from New York City.

The Court: Do not give individual cases. In giving the opinion you have to put them all together and we will take your judgment and view on it.

By Mr. Grimes:

Q. What is your opinion as to the extent of the hardships?

The Court: How would you have him answer? Small? Great?

The Witness: I will say it is a considerable hardship.

Mr. Rollins: I move to strike out the witness's testimony as to the opinion expressed, dealing with the comparative. [fol. 209] The Court: All of the opinion evidence that he gave.

Mr. Rollins: Yes.

The Court: I reserve decision.

Cross examination.

By Mr. Rollins:

Q. Your name is Mr. Abel?

A. That is right.

Q. How many branches has your bank?

A. One home office and one branch.

Q. In other words, it has two banks?

A. That is right.

Q. How long have you served in your bank?

A. Twenty-one years.

Q. When you first came with the bank how many deposits did the bank have, in savings accounts?

A. None.

Q. When was the first account opened?

A. March 30, 1930; that is the day we had the grand opening.

Q. That is the time when your bank was incorporated?

A. That is right.

Q. How many savings depositors has your bank today?

A. Our individual institution?

Q. And your branch? When I talk about your bank, I mean all together.

A. About 8500.

Q. That is, how many that you have as of today, is that right?

A. Yes, it is because of the merger.

Q. When did the merger take place?

A. December 29, just past.

Q. What year?

A. 1950.

Q. How many did your bank have?

A. 4500.

Q. Talking about your bank prior to the merger, how much in dollars and cents did the deposits of the savings department aggregate?

A. Three million dollars.

[fol. 210] Q. How much were demand deposits, dollars and cents?

A. May I ask for a correction? Did you say demand or time?

Q. Time.

A. Time were three million.

Q. Demand deposits?

A. About three million four hundred thousand.

Q. In other words, in 1950 your time deposits, that is savings department was more than your demand deposits?

A. No, I did not say that. Demand deposits were in excess of the time deposits.

Q. Four million demand and three million time deposits?

A. That is right.

Q. How many depositors did you have in 1949?

A. I would say just around 4000.

Q. How many depositors did you have in 1948?

A. I could not answer that accurately.

Q. Approximately?

A. I would say thirty-eight, thirty-seven hundred, something like that.

Q. How many in 1947?

A. There again you are going to ask me to guess.

Q. I am trying to find out. There had been a gradual increase year by year in number and amount of deposits?

A. Yes.

Q. Time deposits only is savings deposits?

A. Has not gone up a million.

Q. What percent would you say was the increase?

A. In time deposits fifteen percent a year.

Q. And number of accounts?

A. Likewise.

Q. You are conversant with the rules and regulations of the Comptroller of the Currency that has jurisdiction of National Banks?

A. I hope so.

Q. Investing your commercial demand deposits and your [fol. 211] time and savings department, there are different regulations with respect to investment?

A. Yes.

Q. Is it the rule and regulation of the United States Comptroller of Currency that time deposits, that is dealing with deposits of savings that is loaned out on mortgage to the extent of 60 percent?

A. That is right.

Q. In making those loans are National banks also subject to the regulations of the United States Comptroller of Currency that any single loan may not exceed 60 percent of each piece of real estate?

A. That is right.

Q. A savings bank chartered by the State of New York making a real estate mortgage deal is not limited to 60 percent of the appraised value?

A. I believe inasmuch as they can go to 80.

By the Court:

Q. Do you know that?

A. Yes.

By Mr. Rollins:

Q. How much?

A. 80.

Q. Is it not for that reason those savings banks do a better business than National banks?

A. I don't think it is.

Q. You mean to tell this Court that if a builder goes to build and requires security, a mortgage to get 80 percent he would not prefer a loan from a savings bank?

A. We can make a loan up to 100.

Q. Provided it is guaranteed by the Government? Take the ordinary one, not secured.

A. How about the Veterans' Administration?

[fol. 212] Q. Forget about the Veterans Administration. I am talking about general business.

A. You are stuck with 60 percent.

Q. Forget about the F. H. A. end of veterans' proposition. Would you say a builder would not rather deal with a savings bank where he can get 80 percent whereas a National bank is restricted to 60 percent?

A. You are right.

Q. Is not that the reason a National bank only pays one percent on a deposit, a time deposit?

Mr. Grimes: I object.

The Court: Sustained.

Q. A savings bank pays two percent interest?

Mr. Grimes: I do not wish to interrupt cross examination ordinarily, but is it to be an issue in this case?

The Witness: Most of them.

Q. Do you know what rate of interest is currently being paid within the last five years by National banks in the County of Nassau?

Mr. Grimes: I object.

The Court: Sustained.

Mr. Rollins: Exception.

Q. Is it not a fact that the reason why savings banks can pay two percent as interest on their money, or money deposited with them on time deposit arrangement is because they obtain more business in the way of real estate mortgages because they are not hampered by 60 percent of the assessed value?

A. I don't think that is the reason.

[fol. 213] Q. What is the reason?

A. They enjoy tax exempt privilege which we do not enjoy.

Q. They have greater business, real estate mortgages, than National banks?

A. They do.

Q. Their primary concern, business, is real estate mortgages?

A. That is right.

Q. That is a mortgage secured by real estate?

A. That is right. They also enjoy tax exempt privilege which is quite a jolt to us fellows.

Q. They do a bigger business than a National bank?

A. That is true.

Q. They are limited only to that class of investment primarily, is that not right?

A. Yes, that is right.

Q. If you were to get more deposits assuming by any means, you would be able to release more of your funds, is that right?

A. That is correct.

Q. Because the greater the deposits with you the more you would be able to release for real estate mortgages?

A. That is right.

Q. Is not that primarily the competitive basis between National and savings banks?

A. The balance we put in Government bonds.

Q. Is not that the greatest source of competition, point of difference?

A. No, I would not think so.

Q. When you state that National banks experience hardship because they are not permitted to use saving or savings, you don't mean to tell me that impedes the success of the bank?

A. No. It is burdensome, though, from the angle that you constantly have to explain your position or apologize for it.

Q. It is an embarrassing position most of all?

A. That is right.

[fol. 214] Q. That is the only source of complaint of it?

A. Other than that loss of business also.

Q. That is just merely your opinion what you might have got?

A. That is right.

Q. Would not you agree with me that it would be more convenient rather than a hardship for a National bank to enjoy freedom of advertising without the restraint of Section 258 of the Banking Law which prohibits a National bank and other commercial banks advertising for the use of current savings—withdrawn.

Q. Would I be correct in interpreting your statement and opinion wherein you claim it is a hardship for a National bank by stating that you mean it would be more convenient for a National bank to be free from restraint in advertising by the use of the term savings?

A. No, I would still stick to the word hardship. It is a hardship to be restrained from using this word.

Q. When you say hardship, that has not stopped your business from growing?

A. That is true.

Mr. Grimes: I object.

The Court: Sustained. Argumentative.

Q. Your bank has increased in number of accounts, I am talking savings accounts, from year to year?

A. Yes.

Q. And in the amount of deposit, is that not right?

A. While others have increased tenfold.

Q. There are other banks who have keener leadership than your bank? I don't want to be facetious about that. Is that right?

The Court: Is there an objection?

[fol. 215] Mr. Grimes: I think the witness ought to be permitted to finish his answer, not to be cut off, this way.

The Court: Had you completed your recent answer? I think the next question will allow the witness to put in the answer he had in mind.

The Witness: That is not so.

The Court: I am going to sustain the objection. I think I will have to allow that. If they want to ascribe it to something else I will allow the question.

By the Court:

Q. Is that due to keener leadership in the other banks than you have in your bank that you say you have sustained these losses by restriction to use those words, saving and savings?

A. When I answered counsellor's question I was thinking of the tremendous growth of savings and loan associations in Nassau County.

By Mr. Rollins:

Q. You heard of the term that competition is the life blood of industry?

A. Yes, life of trade.

Q. Life of trade?

A. Life of trade.

Q. Is banking a trade?

A. It is a business.

Q. That is subject to competition, too?

A. That is right.

Q. Every business has competition, is that not true?

A. That is right.

Q. Every business success depends on the industry of individuals and originality in ideas?

A. That is correct.

[fol. 216] Q. Industry, too?

A. We are not hamstrung by regulations.

Q. Management of corporations depends necessarily upon individuals?

A. That is right.

Q. Their experience and education, is that right?

A. Yes.

Q. Their industry, too?

A. That is right.

Q. You will find there is a comparison in the banking business in the qualifications of men as in other industries?

A. That is right.

Q. Other institutions or places of business or industries prosper in comparative degree, greater than others?

A. That could be.

Q. Some banks have more assets, more earnings than others, is that not right?

The Court: I will allow it.

The Witness: That is right.

Q. Will you say the Franklin National Bank—you do not have to answer if you don't want to—has more ideas, and has given more ideas to banking in Nassau County than any other bank in Nassau County to improve and increase its profits?

A. I would acknowledge the Franklin National Bank is one of the outstanding institutions of this area.

Q. It has grown more than any other older institution of like character?

A. I believe that is correct.

Q. Is that ascribed to the personal industry and unique ability of its president, Mr. Roth?

A. That is right.

Q. Other banks in Nassau County, elsewhere, have used old methods of obtaining customers, advertising for accounts?

A. Some of them have, some of them have not advertised.

[fol. 217] Q. In other words, they sat back and waited for business to come?

A. No.

Q. How many banks have not advertised or solicited for accounts?

A. I don't know. I know mine has.

Q. How many banks without naming them would you say have not advertised at all?

A. That I would not know.

Q. That they have savings deposits?

A. Every bank does some advertising, depending on what branch of their business they wish to push.

Q. You know loaning money on interest is a natural element of the banking business at all times?

A. That is right.

Q. It is not restricted to savings?

A. That is right.

Q. It has been recognized from the beginning of time? You are acquainted with the history of banking?

A. I am, somewhat.

Q. It goes back thousands of years? The answer is what?

A. Yes.

Q. It did originally start with an individual, is that not right?

A. That is correct.

Q. Then it grew into an association and corporation, and that is the evolution of the banking business?

A. That is correct.

Q. And the first attribute of a bank is deposits of monies by people or the public with these private bankers, associations or corporations upon an agreement to pay interest?

A. That is right.

Q. So time deposits is not a natural attribute of any particular kind of business banking?

A. It is the type of banking most of the public out here desire. They are wage earners.

[fol. 218] Q. You have other business people living in Nassau County, substantial business people?

A. They are in the minority.

Q. They deposit their monies as far as you know, in banks? They do not trust Nassau County banks?

A. They do.

Q. A National bank is a commercial bank?

A. That is right.

Q. There are commercial banks under State charter?

A. That is correct.

Q. Enjoying the same type business as National banks do?

A. That is right.

Q. They, too, are restricted from using and advertising for time deposits or using the term saving or savings?

The Court: That is the law.

Q. A commercial bank under State charter is subject to the same regulations by the State Banking Department as a National bank?

A. That is right.

Q. How many commercial banks under State charter have you in Nassau County?

A. I should say about half; I am not too sure of that, though.

Q. Did you ever attend any meetings of the Clearing House Association?

A. Yes.

Q. Was this case discussed amongst bankers there, commercial banks?

A. I was not present, if it was.

Q. It became generally known about this case being tried, and the dependency of this suit?

A. There has been a little talk about it.

Q. Did you volunteer to come and testify?

A. I was discussing the case with Mr. Roth one day [fol. 219] and when I learned more of the situation I offered to come.

Q. Is this defense subsidized by any association of National bankers?

A. No.

Q. Your bank has conformed to the banking law?

A. We have.

Mr. Grimes: I object to that.

Q. In spite of the Banking Law you have made profits, have you not?

A. Yes.

JOHN J. KEUTHEN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 29 Garfield Avenue, Glenhead, New York.

By the Court:

Q. State your experience in the banking business.

A. With the Wheatley Hills National Bank since June, 1920, and prior to that I was for six months with the Bank of Westbury Trust Company.

Q. What position do you occupy now?

A. President.

Q. How long have you been president?

A. Since January, 1936.

Q. That is Wheatley Hills?

A. That is Wheatley Hills National Bank, Westbury.

[fol. 220] Q. Actively engaged in that business daily?

A. All that time.

Q. Have you been in the court room while Mr. Weller, Mr. Evans and Mr. Abel were on the witness stand?

A. I have.

Q. Could you hear the questions put to them and the answers they made?

A. I could.

The Court: Object to this, if you want to.

Q. Would your answers be substantially the same as the answers made by them to the questions put first by Mr. Grimes, then by Mr. Rollins? Would they be substantially the same?

Mr. Rollins: I object on the ground it is incompetent, irrelevant and immaterial, and upon the other grounds I stated with respect to testimony and the opinion given.

The Court: We can do this if he answers this question in the affirmative, then I will entertain your motion to strike out his opinion evidence if that will cover you. How would

you answer that question? Would your answers be substantially the same as the others?

The Witness: I would have to qualify it, your Honor, in respect to increase of savings business which we have not had during the past few years.

By the Court:

Q. In other words, you say your savings department, whatever you call it, has not increased in the last—
[fol. 221] A. Since 1948 we have decreased.

Q. Aside from that, would your answers be substantially the same?

A. Substantially, your Honor.

The Court: If this is satisfactory to both counsel, make your motion to strike out his opinion evidence, which we understand will be the same as the other witnesses and I will reserve decision.

Mr. Rollins: I move to strike out the opinion evidence given by this witness.

The Court: All of the opinion evidence?

Mr. Rollins: All of the opinion so given by this witness.

The Court: I will reserve decision on that. Does not that cover this witness's value to you?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Grimes: I think so, sir. We have some other witnesses.

The Court: Give us the names and addresses.

Mr. Grimes: J. Wilson Dayton, Chairman of the Board, Bayside National Bank, New York, Bayside; Charles J. Machleid, president of the Peninsula National Bank, Cedarhurst, Long Island. The procedure suggested by the Court is agreeable to the defendant.

The Court: It is stipulated that if those witnesses were called their testimony would be substantially the same as that of Mr. Abel, Mr. Weller and Mr. Evans in answer to questions put both in direct and cross examination, and with respect to that testimony the Attorney General injects [fol. 222] the proviso he is not stipulating as to the accuracy or correctness of the testimony given, but the stip-

lation is entered into by him merely to expedite the trial of the case. With that before the Court you may move to strike their testimony.

Mr. Rollins: I moved their testimony be stricken from the record upon the ground it is incompetent, irrelevant, immaterial and is based upon matters speculative and without any evidence upon which an opinion may be predicated.

The Court: Their opinion evidence.

Mr. Grimes: I think we should have it stipulated they are both qualified.

The Court: That is all stipulated, unless you want to read into the record how long Mr. Dayton has been in the banking business, and Mr. Machleid.

Mr. Rollins: I will stipulate they are qualified as bankers.

The Court: They are qualified in the banking business.

Mr. Grimes: I would like in the record Mr. Machleid has been in the banking business since 1910 continuously.

The Court: How as president?

Mr. Grimes: I have a list of qualifications. I will have to run down.

Mr. Rollins: I have stipulated they are qualified bankers.

Mr. Grimes: President of that bank since 1945, and as to Mr. Dayton, he has been in the banking business since 1929, also in the real estate business.

[fol. 223] The Court: Has he been an executive of a bank for a period of time?

Mr. Grimes: Yes.

The Court: How long?

Mr. Grimes: He has been president and chairman of the Board of the Bayside National Bank since July, 1929.

Mr. Rollins: I will stipulate that is a fact for the purpose of this case only.

The Court: That is the way it is understood. On Mr. Rollins' motion I do not think I ruled. Decision reserved on his motion to strike out. What is next?

MATTHEW CHAPPELL, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 52 Stirrup Lane, Roslyn Heights, New York.

Q. What is your occupation, Professor?

A. I am Professor of psychology at Hofstra College.

Q. You head some department there?

A. Yes. I am Chairman of the Department of Psychology.

Q. Where is Hofstra College located?

A. In Hempstead.

Q. How long has it been an education institution, qualified to give degrees?

A. Since 1937, I believe.

Q. Approximately what is the size of the student body?

A. Total student body is about 3800 this last semester.

[fol. 224] Q. What is the approximate size of the faculty?

A. I believe around 300, I would guess.

Q. Who is president of the college?

A. Dr. John Adams.

Q. Would you state what your education has been, Professor, degrees and years in which you took them?

A. In 1924 I had a Bachelor of Science degree, in 1929—

Q. Where was that?

A. That was from Rhode Island State; 1929 the Ph. D., Doctor of Philosophy from Columbia University.

Q. Upon receiving your doctorate, what did you do?

A. I was teaching at Columbia before I got my doctorate, and I continued teaching there.

Q. In what field did you take your doctorate?

A. Psychology.

Q. What was the subject of the thesis?

A. Detection of deception.

Q. Had you taught at Columbia?

A. I taught there altogether about eight or nine years, I would say.

Q. Did you do some other work at the same time you were teaching?

A. Yes, I did research work most of the time.

Q. In what field?

A. Some of it in physiology and nervous system, some in the correction of emotional disorders, and some of the research in the field of public opinion and mass buying behavior.

Q. Did there come a time when you became interested in, did work in the subject of ascertaining public knowledge or public opinion?

A. Yes.

Q. When was that?

A. I have been concerned with it continuously since 1938.

[fol. 225] Q. What have you done in that connection?

A. I have made a rather wide range of studies of public opinion, public response to various forms of influence. Do you want me to be specific?

Q. Yes, I would like you to tell the Court how you became interested in that field, what you have done in that field, and in what capacity.

A. In 1938 I went with the Psychological Corporation which is an organization which has a division called Market and Social Research Division; I became a member of that division. The function of this division is to make studies for business and industries which require the use of polling techniques, for the most part. I remained with the Psychological Corporation, I went with them in 1938 and remained with them until 1940, at which time I joined the staff of C. E. Hooper, Inc. which makes the radio polls, so-called Hooper rating polls; I remained with Hooper until 1943, when I set up my own office, and Mr. Hooper became my first client, and my function as a consultant was to work with industries, business research organizations, magazines, radio networks, so on, doing primarily polling studies in the cases of the industries doing morale studies among their employees, and so on. I closed my office in 1947 and went back with the Psychological Corporation again in the division—no, I went back in the so-called Biomechanics division, which is concerned with problems for industry, working with industrial employees in problems of morale training, so on, all involving sampling procedures. In 19—after one year, in 1938, '48, I went back with the Market & Social

Research division of the Psychological Corporation and re- [fol. 226] mained with them doing polling studies for a wide range of business and industries until the Fall of this year, at which time I came out to Hofstra and I remained as consultant to the Psychological Corporation.

Q. Have you written books on the subject of psychology?

A. Yes.

Q. Did you write a book with Mr. Hooper?

A. Yes.

Q. What was the name of the book?

A. The name of that was Radio Audience Measurement.

Q. What was the subject matter of the book, what the name suggests?

A. Subject matter was methods that are used in obtaining information about radio audiences, using polling techniques.

Q. Would you state to the Court please, some of the more notable polls and surveys involving poll taking that you have done, either yourself, or in conjunction with the Psychological Corporation? In asking my question I mean during the time of the twelve years you have been engaged in this type of work directly.

The Court: Let us add to that what part you played in the activity, whatever it was.

The Witness: In the—

The Court: Polls first, then activity.

The Witness: We made one I think of, a study of public attitudes toward the Dupont Company; that was done for the Dupont Company, and I was directly in charge of the work we might say, I suppose; I say client, I worked directly with the client and worked in designing the study and [fol. 227] writing and reporting it to the Board of Directors of Dupont, so on. I have also worked for General Electric on studies of the effectiveness of their employee communication, and also public attitudes toward General Electric techniques, some of the techniques which General Electric uses for the maintenance of an attempt to maintain high morale. In the studies of morale, morale studies, and in studies of the methods of reaching employees, I have been in charge of those, in the study of public attitudes towards General Electric, I have been just one of a group of the Psychological Corporation who were working on that, the

other being Dr. Freiberg and Dr. Henry Link. For the Eli Lilly Company I did a study of morale——

Q. What sort of a company is that?

A. That is a pharmaceutical, so-called ethical drug company located in Indianapolis, I was in charge of; morale study there was part of a larger study in which we also studied machines and policies and factors influencing employees.

By the Court:

Q. Were there some other activities?

A. Yes. Then did some studies for radio networks. One I recently did on a study of television in the New York area for the National Broadcasting Company, currently doing one for the study of the educational facilities in Nassau and Suffolk Counties for a citizens group here in Nassau and Suffolk. I have done rather a large number of studies on [fol. 228] methods, and developing accurate methods for obtaining information about the influence of radio programs; those were done while I was director of research for Hooper; subsequently when I was consultant to him. Among the duties is one pretty well known in the radio business, study of influence of psychological factors of memory on reports given on radio listening; been rather a large number.

The Court: Could I ask a question?

Mr. Grimes: Certainly.

By the Court:

Q. Suppose we help you out this way. How many more of those similar activities would you say you have been engaged in since 1938?

A. I would suppose probably between 50 and a hundred, probably.

Q. In each of those activities was that devoted to ascertaining the public mind about some question?

A. That is what I was speaking of in saying 50 to 100; yes, some of them were done in Canada as well as the United States.

Q. In ascertaining the public state of mind with respect

to these different given questions, that was ascertained in what way?

A. Through the use of sample taking, and personal interview with a sample of the population.

Q. Then you would get reports, would you?

A. That is right. The interviewers would be sent out.

Q. And in those activities, 50 to 100 of the kind you have mentioned, including the kind you have mentioned, could you tell us what has been the nature of your participation [fol. 229]?

A. My participation has usually been in the matter of designing and directing the study, and writing the reports and making a contact report to the client subsequently.

Q. I would think the important part of that would be interpreting the reports?

A. That is correct.

Q. Do you include that in your participation?

A. Yes.

Mr. Rollins: May I ask, what your Honor said about the public mind, did you mean public opinion?

The Court: Yes.

Mr. Rollins: I think there is quite a distinction between mind and opinion.

The Court: I think maybe I will put that in the question.

By the Court:

Q. Would your answer be the same when I said your object was to ascertain the public mind about a given question, if I said public opinion?

A. It would be the same.

The Court: I used mind synonymous with opinion.

By Mr. Grimes:

Q. Have your surveys, 50 to 100 also included the matter of public knowledge?

A. Yes, a good many have been public knowledge, some public attitudes, some public opinion.

[fol. 230] Q. When you say public attitudes, will you give the Court an illustration of what you mean by that?

The Court: Did he not give that when he said the General Electric Company retained him, the Dupont Company retained him to find out what the public thought of the Dupont Company?

Q. May I ask about one more? Did you do a study and survey of the attitudes toward public ownership on one occasion?

A. Yes, on more than one occasion.

Q. Would you state what job you did in Canada in that connection?

A. In Canada I was consultant to the Elliott Hames Research Organization, and developed for them surveys for measuring public attitudes toward large industries, and toward Government and Government ownership.

Q. For what company did you do that?

A. Elliott Hames had as a client on that the Canadian Industries, Limited, so-called, C. I. L. General Motors of Canada, General Motors, Ltd.; Imperial Oil and one other, I don't recall just at the moment.

Q. Were the Dupont Companies involved?

A. Dupont owns quite an amount of stock in Canadian Industries, Ltd.

Q. Precisely what was the subject of that survey?

A. First, to find out what the public's attitude toward ownership of various industries in Canada was, and what attitude toward these, group of large companies in Canada was, and the factors which might be influencing attitudes toward large companies.

[fol. 231] Q. You have told the Court you had developed some techniques yourself in connection with the measurement of public knowledge or attitude?

A. That is correct, yes.

Q. Will you state what some of those techniques are?

A. One of them was a technique for determining radio audience listening by using somewhat smaller numbers of people than had previously been used for getting information, what they were listening to at a given time and what they had listened to previously; this was called a combination of so-called coincidental and day part recording.

Q. Is that in the book which you wrote?

A. That is the book which I participated in, Radio Audience Measurement.

Q. Is there another contribution you have made to the science of sampling?

A. Yes, there is, a section in there on sampling and statistics of sampling.

Q. Have you made a special study of sampling?

A. I have studied that quite carefully. I do not quite get what you mean by a special study.

The Court: That is the answer. Counsel wants to know if you are familiar with it.

Q. Without going into detail, have you written extensively on sampling?

A. I have written material in a book on sampling and one or two articles perhaps on sampling.

Q. Have you written rather extensively on the subject of surveys in general?

A. Yes.

Q. About how many articles have you written, and for what periodicals?

A. I suppose I have written about a dozen; they have [fol. 232] usually appeared in trade journals, in the radio field and in public opinion quarterly, and in a book.

Q. In the psychological field how many articles have you published, approximately?

A. I would say approximately 40, 50.

Q. What course do you teach in Hofstra?

A. One called business industrial psychology, which includes in it as part of the contents, problems of sampling survey methods, so on, also applied psychology, where we teach those, rather more applied than business industrial; applied was second, and general.

Q. Have you lectured before societies?

A. Yes.

Q. Will you name the societies?

A. American Association for the Advancement of Science; American Psychological Association, the Eastern Division of the American Psychological Association, New York Psychological Association.

Q. Will you state briefly to the Court the development of

public opinion, public knowledge and public attitude polls? By that I mean, in the various categories, starting with the first, going to the second and then to what I understand to be the present stage involving the one which you have used.

The Court: I think that question ought to be free from very general.

The Witness: There are, I would think, perhaps three stages that you could have in the development of these and one of them, if I understand, you want the historical development?

A. Yes.

The Court: We really do not want a history. If there are [fol. 233] three stages in its development and you can state them briefly, we will take that.

The Witness: First, there was a period in which polls were taken where you went out and got a few people here and there, and perhaps the most outstanding example of this rather crude type of sampling was represented by the Literary Digest, in which for their sampling they took people whose names were in the telephone directory; perhaps as a result of the big error that occurred from using that technique the second stage of development occurred, which was what we speak of as quota sampling; it is a much more reliable technique than cruder methods, and you attempt to distribute your sample in accordance with what you know of the population, in accordance with what you may have on the population, and where you do not have exact data you may try to develop some sort of criteria as for example in economic status; we have no exact data on economic status but in quota sampling, one still attempts to distribute its sampling over a wide range of economic groups, so actually we speak of the highest percent of A group, next, 20, next 30—I should say the next 30 is called B group, the next, 40 C group, the lowest 20 percent D group and in using this type of sampling, you direct the interviewers to get so many in A and B group, so on, but those economic data, economic classifications are not very [fol. 234] well, they are a little bit loose, because they depend on intuition to a large extent. We think evidence has been accumulated over a long period of time shows

actually using this type of sampling you tend not to get the lowest economic strata.

By the Court:

Q. That is called quota?

A. That is called quota. The third type of sampling, a type which is generally recognized as being the very best scientific development at the present time, goes by the name of a probability type of sampling, and in the probability type sample nobody uses any judgment in the selection of people who are to be interviewed, that is all done by mathematical procedures, with the result you have a strictly random selection, and when the sample is properly designed, every member of the population has exactly the same chance of becoming part of the sampling as every other member of the population.

Q. Is that as you see it, one that makes that poll better than the first and second types which you described?

A. Obviously. What we try to do in sampling is make that sample represent the population from which it is drawn, and when we take out all human judgment and use random selections we get the best representation that we can get.

Q. Is that type of sampling in your opinion the best type?

A. That is the best type.

Q. Have you recently worked on a poll done by Hofstra College for the Nassau Clearing House Association?

A. Yes.

[fol. 235] Q. Would you state what the character of that poll is?

A. (No answer.)

Q. May I say this, you understand, do you not, that the expenses of that poll have been paid by the defendant in this case, is that correct?

A. To the best of my knowledge, that is correct.

Q. The poll has been done at the request of the Clearing House Association?

A. That is correct.

Q. Your college was asked to do this poll, and you have completed the poll, is that correct?

A. The president of the college was asked to do the study, yes.

Q. The study has been done by the college?

A. That is correct.

Q. Have you been in charge of that study?

A. Yes.

Q. Could you state to the Court what that study has consisted of?

A. It was a study designed to determine for the population 21 years of age or over in Nassau County how much information they had, or how much knowledge they had of the meaning of the four terms which have been discussed here in court, terms used in banking, savings account, compound interest account, thrift account and special interest account. We also undertook to find out where people, what knowledge people had of where these accounts were available, if they knew anything about them, and finally what account they preferred to open when they had money they wanted to put out at interest, and in what type of bank they preferred to open an interest bearing account. That was roughly the purpose of it.

[fol. 236] The Court: You want him to go right through?

Mr. Grimes: *It* think it will take probably an hour, because I will ask him various steps he took and how they did this; and because of the type he says as probability samples they used, involving mathematics, I do think that would take three-quarters of an hour or an hour to an hour—

The Court: I do not think we could stay that long because then we would have to have cross examination. Convenient for you to recess at this time?

Mr. Grimes: I think this would be a good time.

(Adjourned to January 29, 1951 at 10:00 A. M.)

Mineola, New York, January 29, 1951.

Trial Continued

MATTHEW CHAPPELL, recalled as a witness having been previously duly sworn, testified further as follows:

Mr. Grimes: We submit to the Court a memorandum on the admissibility of the Hofstra survey, which is the subject of the Professor's testimony. I have given a copy to the Attorney General.

[fol. 237] Mr. Rollins: I have not had a chance to prepare any memorandum, but to me—

The Court: I will give you the fullest opportunity. I am going to receive it in evidence and I will give you each a motion to strike out, and on which I will reserve decision.

Mr. Rollins: The subject concerning which this witness is to testify, is not a subject of expert testimony.

The Court: If you object, I am going to overrule the objection on all grounds, then I say, because I am in great doubt myself about it, move to strike it out at the end and I will reserve decision, then I will be able to read Mr. Grimes' memorandum. I will read anything you submit, but let us get the evidence and get the witness out of the way.

Mr. Grimes: Since we have a number of documents I would like to have Mr. Brumback, who is assistant to Professor Chappell, and on the the staff of Hofstra College present at the counsel table if I could. It will assist me with any document, and it may facilitate. Will that be permissible?

The Court: That is granted. Have him at the counsel table, wherever you want him.

Mr. Grimes: I would like to ask several questions, on one more item relating to qualifications, if I might.

The Court: Yes.

[fol. 238] Direct examination.

By Mr. Grimes (Continuing):

Q. Professor, will you please state briefly what the American Board of Examiners in Industrial Psychology is?

A. The term is Professional psychology, American Board of Examiners in Professional Psychology.

Q. Yes.

A. This is a board which has been set up by the American Psychological Association to pass on the qualifications of psychologists working in the psychological professional fields, one of these being the field of business and industrial psychology, and if they pass favorably upon one's qualifications he then becomes known as a Diplomate in the field in which he is qualified.

Q. Are you a Diplomate of that board?

A. Yes, I am.

Q. When did you receive this honor?

A. About two years ago, almost immediately after the board was set up.

Q. In what fields are you a Diplomate?

A. Business and industrial psychology.

Q. Coming down to the present survey, would you state what the survey was designed to determine? I believe you stated in part, but even though some repetition might be involved, will you state that in full?

A. Yes. May I use notes to refresh myself?

The Court: Yes. If you cannot remember without notes use notes to refresh your recollection.

The Witness: There were four things the study was designed to determine.

The Court: This is this particular?

[fol. 239] Mr. Grimes: Yes.

The Witness: The first was what the meaning of the four terms used in banking is to people 21 years of age or over in Nassau.

Q. What are those terms?

A. Terms are savings account, compound interest account, special interest account and thrift account.

Q. Will you state please, the reason for the selection of Nassau County?

Mr. Rollins: I object to the question on the ground—

The Court: I will sustain the objection to that.

Q. The survey was confined to Nassau County is that correct?

A. Yes.

Q. Will you please proceed to state what the study was designed to determine?

A. The second factor was to determine people's knowledge as to financial institutions in which each of these four accounts is available. The third purpose was to determine the kind of account that is preferred when such people wish to open an interest earning account, and the fourth was the type of bank in which they preferred to open the preferred account.

Q. Bank? Did not the question also include financial institution?

A. Financial institution, I should say.

Q. I believe you testified on the general subject before, but I wish you would elaborate to some extent at this point upon the types of surveys that have existed, that is [fol. 240] to say, three surveys since surveys came into being, at least in modern times.

A. Well, the first as I remarked on Thursday is the period in which we used very crude types of samples, where there was no attempt to represent the population about which one wished to speak; rather one went out and took interviews with a few people who may or may not represent the population, and then made interpretations as to the total population.

Q. You designate that as crude?

A. Called that as crude, and perhaps representing the best known sample of the studies in which that type of sample was used was the Literary Digest study.

Q. What did they do in that?

Mr. Rollins: If this witness knows. That would be hearsay.

Q. If you do not know, do not answer.

The Court: Do you object?

Mr. Rollins: Yes.

The Court: Sustained.

Q. Do you know what was done in connection with the Literary Digest poll from your knowledge, experience, reading, study or in any other fashion by which a man gains knowledge? I ask you that as an expert witness.

Mr. Rollins: I object.

The Court: I will sustain the objections. I think it is just too far afield. We are down now to this particular study,

and he says he gave us the classification under which it was [fol. 241] prosecuted and he also gave us that very opinion you are now seeking, before, but not so much in detail. When he gave various divisions of this sampling he gave us the example of the Literary Digest poll. It was not objected to then. I think we ought to move along on this.

Q. On this particular poll, Professor, would you state what you did right from the beginning, and explain to the Court the reasons why you did one thing as distinguished from another, bearing in mind the distinctions that exist between the various types of polls and the various methods employed?

The Court: I think that question ought to be broadened. I think Mr. Rollins will agree with it, although he does not agree with the admission of the evidence. This gentleman supervised the whole thing, and instead of just confining his answer to what he did, let him give an exposition now, if it fits into your train of thought, what was done by everybody.

Mr. Grimes: I meant to say what was done by everyone.

The Court: Let us have it that way.

The Witness: In answering this I would like to take, divide it into two divisions, one method we used for gaining the opinion and the other people from whom we got it; in other words, what did we ask and whom did we ask. The first method as to what did we ask, this was, the study was [fol. 242] made with personal interviews by trained interviewers; the interviews were obtained in the homes, and they were obtained only with persons who were designated mathematically to be interviewed. I have here some examples of questionnaires which I would like to show, if I may. Since we were dealing with four terms—

Mr. Grimes: I would like at this point to introduce the questionnaire in evidence, that is form of questionnaire only.

The Witness: That is the form of the questionnaire only.

By the Court:

Q. They were prepared under your supervision?

A. They were prepared under my supervision.

Mr. Rollins: I object to the offer in evidence upon the ground it is incompetent, irrelevant and immaterial, and violates the hearsay rule.

The Court: I would rather you would not make that motion, because that motion, according to your view of this evidence should have application to every question, and I excused you from making that objection on this type of evidence before, so I will make the ruling that we will consider you have made a motion, you have made an objection to every question put to this witness on the ground that the testimony is hearsay.

Mr. Rollins: Not only to those questions he has already [fol. 243] been asked, but all questions right down to the conclusion of his testimony.

The Court: And on each one I shall overrule the objection and grant you an exception, and on each one I will say to you make a motion at the conclusion to strike out and then I will reserve decision on that one.

Mr. Rollins: Thank you.

The Court: Now, then, we will mark the exhibit.

The Witness: D-G. There is only one thing that differentiates each one of the forms, and that is we have in the first question rotated the order in which items 2, 3, 4 and 5 appear. The first item is always checking account; we used that as an introductory question, but we had to rotate 2, 3, 4 and 5 so that we would not introduce any error or bias due to serial position.

The Court: You got as far as saying those questionnaires D-G were prepared by you. Will you go on from there.

The Witness: The reason for preparing four forms was that we were dealing with four terms used in banking, and about which we wished to ask the respondents. In order to avoid any error or bias which might come from having one of these elements always being first, one always being second, one third and one fourth, we rotated the position so that for example—

By the Court:

Q. You rotated those terms in order.

A. That is right.

[fol. 244] Q. We can see that from the form? I noticed it.

A. That is the only difference between the four forms of questionnaire. In all cases the second question was, will you please state what kind or kinds of financial institutions offer each of these services, and by financial institution we mean banks of all types and savings and loan associations. Services were then indicated on the questionnaire. The third question, when you deposit money to earn interest, which of these accounts do you prefer to open, and the final question, 3-A asked of those who had expressed a preference for one or another type, in which type financial institution do you prefer to open such an account.

Q. Does that complete your answer?

A. That completes the questionnaire.

Q. You have said these were interviews with persons at home, with persons you designated mathematically. Will you explain the reason for mathematical designation.

By the Court:

Q. What do you mean by that word?

A. I mean that in every step of the development of this sampling we used numbers, random numbers to determine which city, which part of the city, which dwelling, which person is going to be selected to be interviewed. We have designed this so that every person in the County who is twenty-one years of age and over has an equal probability of being selected in this sample.

Q. When you say probability, you mean a mathematical chance?

A. A mathematical chance, each person having an equal [fol. 245] mathematical chance of being selected as a member of the sample.

Q. Will you explain to the Court what you mean by a sample? I realize that raises a very large question; it will be the subject of your testimony, but there is one aspect of a sample, is there not, namely, the number of persons interviewed?

A. That is right, the number of persons whom we interview, from whom we took interviews was 928.

Q. By sample you mean the number of persons interviewed in relation to the entire population?

A. That is correct.

Q. Will you explain, please, the merit or lack of merit, or what your opinion is, on the subject of mathematical selection as distinguished from the type of selection used in other polls?

The Court: He has already answered that earlier. He said that that was the third classification, and an improvement over—that is the time he spoke about the Literary Digest, just taking names out of a telephone book. This method, he has the more fluent language to describe it, but it seems to me it charges certain elements of the County generally; they have a possibility of being interviewed, and then his mathematical arrangement selects from the community various groups, and the people in those groups, and I think that is how he said he arrived at it. Is that about right?

Mr. Rollins: The other four were taken out of the telephone book. He has not said how he got these.

[fol. 246] The Court: He is coming to it.

Mr. Grimes: May we have the witness's answer to the Judge's question? We have interruptions. I would like really his answer to your question about that.

The Witness: Yes.

By the Court:

Q. Is that about what it is? Don't mind correcting me, because this is the first I ever heard this.

A. What I would like to show is, exactly what we did do.

By Mr. Grimes:

Q. The Judge asked you a question.

A. And I answered it, yes.

The Court: Do you know where you left off? We are going to hold you to your train of thought.

The Witness: We had complete discussion of the method. I would like now to start in discussing with whom did we select the sample. When one wants to obtain knowledge from a population there are two ways that you can do it. First, you can go to everyone of the population, which is a census, but to take a census is a very, very expensive operation, and even the Government does not afford it,

often so in science and in working on a public opinion market we have developed a concept of sample to try to represent its population by a smaller number of people who can [fol. 247] be managed by a manageable size. When we use a census there is never any question, but what the answer you get is one and only, it is a definite one, definite, absolute thing. When you use populations, when you use samples of populations you may come out with a figure which is exactly the same as you would get from the census, but you may come out with a small variation from that census figure. If a sample is properly designed, you know exactly what the limits are within which a variation from the census can occur. There is only one type of sample in which you can compute these possible limits of variability, and that is with the probability type of sample which I wish to speak of here. That is one of two major differences.

By the Court:

Q. Is that the sample that was employed in this study?

A. That is right, one of two major differences between this type of sampling and earlier samples which we speak of as quota is, that there are no mathematics applied to the quota sampling which enable you to calculate what the error might be; I don't mean to say quota sampling might not be very accurate for certain purposes, but we claim one never knows exactly how accurate it is because there is no way of measuring the accuracy. In the case of a probability sample you can measure it with accuracy very definitely.

Q. You spoke of one of the differences. Is there another [fol. 248] major difference between probability and quota type of sampling?

A. Yes, there is the other, which may become apparent later here is the fact that in a quota sample somebody has to exercise judgment in determining what cities, for example, might be used, city, town, village, what part of the city somebody decides he will use this or that part of the city and he decides, then sends an interviewer out, and the interviewer decides what house he will go to, and when he gets to the house he will usually decide he will take whoever comes to the door if he can, and that creates a bias based on availability of the people who are most readily available.

You also get a sample which is strongly biased in the direction of small homes. If you take somebody in every home then the person who lives in a small home has a greater probability of being selected than a person in a large home. I will make that a little clearer.

The Court: That is very clear, that whole statement is clear. It goes back as you said to the judgment of the man who selects what city to take. If he is wrong on that the poll is wrong.

The Witness: That is right, it is a judgment sample, it may be accurate, but we don't know how accurate.

Mr. Rollins: I object, of course. The sample is to represent every part of the population.

By the Court:

Q. You say sample. You mean sample in this study?

A. That is right.

[fol. 249] Q. If I ask you that?

A. I wanted to represent every part of the population. We want to do it without introducing any judgment on the part of any person. The sample which will reflect the total population most accurately will be a sample in which every person in the population has the same chance of being selected in the sample, and in the design of our sample that is what we have undertaken to preserve, that is every individual in the population shall have the same probability of being selected.

I would like, if I might, Judge, to quote from a bulletin put out by some men in the Department of Census on this thing we have been talking about, judgment: it is just a very short quotation; this is done by Hanson & Horowitz; the publication is a publication of the United States Department of Commerce and the Bureau of Census; it is called a new sampling of population, sampling principles introduced in the Bureau's monthly report on labor affairs.

By the Court:

Q. You are familiar with that publication?

A. Yes, and I know the men who have published this.

Q. Is it recognized as an authority?

A. It is.

Q. It is an official document?

A. It is, the statement is this: "Personal judgment if exercised in determining the particular units to be included in the sample indices—involves the risk of serious bias, and also makes it impossible to use existing samplings that are to determine what the sample error is likely to be." I use that to verify the statement there are no mathematics available for quota type sampling. You have, when you [fol. 250] are attempting to give everybody an equal opportunity to be included in the sample, you are using what we speak of as random selection, and we mean that random selection sort of thing you would obtain if for example we were, suppose we were to put the names of all of the people in the County in a bowl with a slip of paper and we mix that bowl up and drew off one name at a time much as they do in the draft. Sometimes this would be a random selection. Another type of random selection that is used more frequently nowadays is to deal with units with which you are concerned and give them a number; if we had a hundred persons that we wanted to select from we would give each one of these persons a number, then we would go to what is called a table of random numbers.

The Court: Let me interrupt you. Would it not be better if the testimony was what they did now. This is what you did.

The Witness: Yes.

The Court: Suppose we put it in the past tense.

Mr. Grimes: I think so, except that I think it is impossible to distinguish the theory and practice and I asked him if he is prepared to make full explanation.

The Court: He said as soon as you did these things. Suppose you put them in the past tense with respect to these questions on from there but keep in mind Mr. Grimes' idea to give an exposition on each subject before you go into it.

Mr. Grimes: I ask the Court to allow him liberality in explaining.

[fol. 251] The Court: Yes.

Mr. Grimes: So our record may be complete. I think that will satisfy the purpose very well, and that is the purpose of the examination. I am offering this testimony merely by

way of explaining in advance as to what they did, so when he testified what they did it would be more understandable.

The Court: Proceed in the way you are.

The Witness: Tables of random numbers have been designed so that we can get a greater degree and more exact randomness than is possible than even drawing from a bowl. Studies that have been done drawing from a bowl show, that even here you may get some pattern, you do not know why, but you do get them to random. You might get the same pattern and perhaps random numbers. The tables are to assure that we do not get any kind of pattern in our selection. The best known of the table of random numbers is one by Tibbett, done in England. We did use these tables. We also used a table from Snedecor here. Snedecor is a standard text in statistics. The use of these tables does produce more exact random selections than can be obtained in any other way. In the design of our sample, and in the design of any sample it depends on how you design it, depends on what data you have available.

Q. Will you tell the Court what the first data you have used was?

A. There are two types of data we use. One is information obtained from the Bureau of Census on the distribution [fol. 252] of population in Nassau County. This is the census release, 1950 census of population of preliminary count.

By the Court:

Q. United States official census?

A. That is the official census, and there are some very, very minor adjustments that may be made in the official count.

Mr. Rollins: If it is an official report the Court has power to accept it.

Mr. Grimes: I think it might be appropriate to offer this in evidence.

Mr. Rollins: This is subject to the same objection.

The Court: Mark it.

Mr. Rollins: The Court can take judicial notice as to the number of people in this County.

The Court: Mark it in evidence.

(Paper received in evidence and marked Defendant's Exhibit H.)

The Witness: These are all of the data that are available and the—

Mr. Grimes: There are some markings which are not part of our offer. The phrase "Psychological Workshop."

The Witness: The data which are available show this: The population in the County as a whole, the population in each of the three Townships in Nassau County, Hempstead Town, North Hempstead and Oyster Bay. They show for each of the Townships the population in each of the [fol. 253] incorporated areas of a thousand or over; to find out what the population is in the unincorporated areas, you have to subtract the total for the incorporated part of the township from the total of the township. It happens in Nassau County 54 percent. of the population lives in areas which are unincorporated. There are no statistics for that part of the population. We can—with the parts which deal with incorporated areas, we can lay out our sample in accordance with these steps; first, we can divide our sample so we locate the proper proportion in each of the townships, and that proportion is, Hempstead would get 67 percent, North Hempstead, 22, Oyster Bay, 11; that is on the basis of population. We speak of these using the data from the census to apportion our sample; we speak of that as stratification. We stratify not only in terms of townships, but also we will make a breakdown in terms of incorporated and unincorporated, and we speak of those as sections from the stratification, so 54 percent. of our sample is going to be drawn from the unincorporated areas, and 46 percent. from the incorporated areas.

Q. Did you stratify the population in connection with the construction of the sample?

A. Yes.

Q. You had reasons for doing so, did you?

A. Yes.

Q. Explain to the Court what those reasons were, please.

A. By stratifying the sample we increase its accuracy, or we decrease the limits within which the results can vary, but [fol. 254] the essential purpose is to use data that are avail-

able, modern data to increase the accuracy over what you would get with pure random in an unrestricted random sample.

Q. Will you explain why you made the breakdown, if that is what you did, in Oyster Bay and North Hempstead?

A. Yes.

The Court: Maybe we better recess.

Recess to 2 P. M.

Afternoon Session

MATTHEW CHAPPELL, resumed the stand and testified further as follows:

The Witness: The reason for making the breakdown between townships is there might be some difference between people in various towns, but if we allot the same percentage of sample it corresponds to the percentage of the population in each township we will represent what differences there may be exactly.

The Court: That, I think, answers your question?

Mr. Grimes: That does, yes.

The Court: Why he made the breakdown.

By Mr. Grimes:

Q. If there was another kind will you please tell the Court about it, the stratification and in connection therewith each item thereof?

[fol. 255] The Court: Keep that question in mind. I do not know whether you have not mentioned anything about two cities in the County.

The Witness: I had not quite got to that yet.

By the Court:

Q. I know that was not in the question, but the question was about towns. You have it in mind. What is your next question?

Mr. Grimes: My next question was to ask him to continue with stratification, together with the reasons therefor.

The Court: We will go back to his broad question and proceed with the exposition of what was done with respect to this, amplifying as you go along.

The Witness: I mentioned we had used the census data as one bit, or as part of the data for distributing the sample. However, that applies primarily only to incorporated areas, we have no data from the census which will help us distribute our sample in unincorporated areas, so it is necessary for us to find some other source of data which we can use to develop our sample for these areas. We found that there was an aerial photograph of the whole of Nassau County which was made in April, 1950, and we used this aerial photograph to supplement the census data in developing our sample. If I might, I would like to show the Court a [fol. 256] sample of that aerial photograph. This sample here is an aerial photograph of Glen Cove, and it is taken—the photographs are on a scale of about five inches to a mile, which enables us to count the structures on the map. Our purpose then is to develop a sample of structures for this area where we do not have any population data. If you care to, you might just use the glass and you can see the structures a little more readily.

The Court: I can see them.

The Witness: This was an incorporated area; we have also here an unincorporated area which we have called area N, which I will explain a little later, and actually this is Levittown, and you can see dwellings in Levittown readily. These are the data we used to develop our sample in the unincorporated areas and also as I will show a little later, we used them to develop the size of the sample in incorporated places for which we have no block statistics. There are in Nassau no towns or cities that are sufficiently large so that the census will provide block statistics—that is, the number of dwelling units in a given block.

The Court: Just hold that for a moment. We better mark those the witness has spoken about.

Mr. Grimes: I would also like to offer them in evidence after I have asked a few more questions.

The Court: I will receive them in evidence now with the same reservation of rulings.

[fol. 257] Mr. Rollins: Note my objection as heretofore.

The Court: Always.

Mr. Rollins: Incompetent, irrelevant and immaterial to the proceedings.

The Court: Let us have those marked because I say the witness referred to them just now so that it will be in the logical order in the record.

(The aerial photographs received in evidence and marked Defendant's Exhibits I and J.)

Mr. Grimes: May we designate Exhibit I as aerial photograph of Glen Cove City and Exhibit J as aerial photograph of what we designate as area N, being the Levittown area?

The Court: All right.

The Witness: These are the two sources of data we used in developing our sample. I would like to read the specifications of the sample as we designed this. I think it might be getting things along a little faster. The first population to be sampled was defined as of persons twenty-one years of age or older, residing in Nassau County; secondly, a sample of the aerial phototype was used which made it possible to designate in advance those households where the interviewers would call for an interview. This insured that interviewer bias would not affect the selection of persons to be interviewed.

[fol. 258] Q. There is a term I would like defined if I might, the term bias.

The Court: That is what I want to hear. I think I know what you mean, but you better put it on the record. What do you mean by the word, bias?

The Witness: We mean by the word, bias, that our sample, if the sample is biased, there is some way in which it fails to represent the population it is supposed to represent, and that is what we mean by bias; failure to get perfect representation would be bias.

Q. In other words, bias is a deviation from the true representation of the entire population, is that correct?

A. Yes.

By the Court:

Q. That goes back to your original principle that you remove as much as possible judgment of an individual from the method to be followed?

A. That is true. The third aspect of the plan required that all adult persons residing in the County be given an equal chance of being drawn into the sampling. This insured that the sample would be representative of the entire County. Fourth, the sample size was set at approximately 1000 as being sufficiently large to provide reliable data. Fifth, for administrative reasons, it was decided that the sample would be drawn from 60 clusters or small interviewing areas distributed over the County. These areas were to be well defined, so that the interviewer would know exactly where to work. The clusters were bounded by streets, roads, railroad, or other natural land marks. If I might have a cluster map I would like to show the Court what we meant by the selection of clusters here and there, and their distribution. This is actually the end result which I would like to show to you.

Mr. Grimes: I ask that map be marked for identification.

The Court: I think, Mr. Grimes, if he uses it I will mark it in evidence.

Mr. Grimes: Very well. I am going to offer it.

The Court: So let him talk on a little bit further as to uses. We will put it in evidence.

The Witness: This is the way the clusters actually did fall. I will explain how they were selected later. You can see that the large number fell in dense population areas; in here in the areas where there is little population—

By the Court:

Q. You are referring to red circles with a number in the center?

A. That is right. These are so-called cluster numbers, and this is approximately where they fell.

Q. The circle is approximately the area?

A. That is right, yes. The circle does not define the area, but the area is where the circle is somewhere, and I will

show you exactly a sample of the exact map, of blocks that were involved.

[fol. 260] Q. The circle is to identify the area on this map so that you could see it quickly?

A. That is right.

The Court: Suppose you stop there. Let us mark this map in evidence.

Mr. Rollins: The plaintiff objects to the introduction of the map offered on the ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection and receive it in evidence.

Mr. Grimes: At this point I would like to ask just a few questions in regard to Exhibits I and J, for the purpose of offering those for identification.

The Court: Go right ahead, keeping in mind your over all question of where you stopped on the question of locating the clusters. Now Mr. Grimes wants to interrupt.

By Mr. Grimes:

Q. I understood you to say that you used an aerial photograph of the entire County; is that correct?

A. Yes.

Q. Is Exhibit I for identification a portion of that aerial photograph?

A. Yes.

Q. Also Exhibit J for identification?

A. Yes.

Mr. Grimes: I would like to state to the Court now—excuse me.

Q. Did you in the course of preparation of the sample and the production of this survey use the entire aerial [fol. 261] photograph of Nassau County?

A. Yes.

Mr. Grimes: I would like to say that we have the entire aerial photograph in Court, and I would like to have it produced for inspection, if anyone cares to inspect it. We have produced it here and it is available for inspection. We will put it right on the table. I now offer in evidence our

Exhibits I and J for identification. I offer them in evidence.

The Court: I thought they were in evidence.

Mr. Grimes: No, marked for identification.

Mr. Rollins: I object to them.

The Court: We will receive them in evidence now, and your objection will be noted.

(Papers received in evidence and marked Defendant's Exhibit K.)

By Mr. Grimes:

Q. Will you proceed, please?

A. I wonder if we might now have the stratification map showing areas I would like to—I have it right here. We, having census data and the aerial photograph, we were in a position then to lay out our total sample, and the first step as I pointed out was to divide this into first, the three townships, and then to divide the towns in incorporated and unincorporated areas within each township. On this map we have the areas. We show the unincorporated areas and the towns. The unincorporated areas are those that are marked with a letter. In the area that is marked with [fol. 262] the letter—that is, in the unincorporated area, and we speak of these areas, we can call them areas, pseudo-towns or anything we choose, they are distributed throughout the three townships. We made the stratification then——

Q. Excuse me just a minute, Professor, how did you designate this map? I don't mean by letter, please.

A. There is a title right on top there.

Mr. Grimes: I offer in evidence what purports to be street and road map of Nassau, bears the designation on top, map showing incorporated and unincorporated areas as defendant's exhibit L.

The Court: That being the map which the witness just used in the course of giving his testimony. It will be received in evidence.

Mr. Rollins: I object on the ground it is incompetent, irrelevant and immaterial.

The Court: The same ruling. In your objection you are including the word incompetent, and it gives me a little

trouble, and it does not serve any purpose from your point of view. You are not objecting because of its being inaccurate?

Mr. Rollins: I am not questioning the accuracy of these maps, or whether the fact they were taken, but I do not see it has any bearing on mind or imagination, brought in for local color to build up. This is an insult to my intelligence, no matter what source it comes from.

[fol. 263] The Court: The element of the competency of the map being removed, and that applies to all of the maps, as he generously said, I will receive them in evidence. His objection to materiality and relevancy will stand.

Mr. Rollins: So there will be no question about the grounds of my objection, aside from the fact they are incompetent, irrelevant and immaterial.

The Court: State it at the end and you will have produced all the grounds you can possibly consider, if you state them now, but I ran into the question of the competency of the map, so I am thankful to you for not presenting the competency. Go ahead, mark it.

(Paper received in evidence and marked Defendant's Exhibit L.)

The Court: Were you interrogating the witness, or did you want him to resume?

Mr. Grimes: I think he can resume.

The Witness: At 46 percent the sample was allocated to incorporated areas, and 54 percent to those unincorporated areas that are indicated there by the letters. I had previously mentioned what the percentages were for the townships. The next division was division by size of the place, starting from the city, the town, villages.

Q. Is that what you call the array?

A. This is the array of towns.

[fol. 264] Q. What is the first array you made, one of towns?

A. Incorporated places.

Q. We are now starting with what they call incorporated places?

A. Yes.

Q. That is 46 percent of the County by population, is that right?

A. Yes. I wonder if I may have my bag up here. What we wanted to do was to be sure we represented every place of different sizes with its proper weight. To that end we drew up what we call an array of towns, starting with Hempstead, which is the largest, and when I say town, I mean towns, cities, small places.

The Court: Small letter T.

The Witness: That is right.

Mr. Grimes: They are using census data, which differs from our legal classifications.

The Witness: So we put these in an array, and we know we are getting every one of these places which are incorporated, and have a population of 1,000 and over; we know there are 27 clusters to be selected from that group.

Q. Why 27?

A. Because that is the proportion of population which falls in this incorporated place over 1,000.

Q. That is 46 percent or 60?

A. This is a little less than that because part of the population also resides in incorporated places of less than 1,000. There are about 13,000 total population in the County which is made up of places of less than 1,000 which are incorporated. The total population in these areas in this incorporated part of more than 1,000, is 296,423, and [fol. 265] since we are to draw 27 clusters that means we can do that by dividing the 296,423 by 27.

Q. By the way, at this point I do not think you have given the total population of Nassau County under the 1950 census.

A. Total population is 666,000 and two hundred something as I recall, I don't remember the exact figure.

Q. The figure you have just given, 296,423, would bear the same ratio to that as your 27 clusters bears to 60 clusters?

A. That is right. We speak of this division by number of clusters as a sampling interval, and we use the sampling interval in this way, and here I have to go back to our random numbers. We have first our array of cities, from

the largest to the smallest, and every time there is an interval of 10,979, we are going to locate one interviewing place, wherever that 10,979th person resides. In the case of Hempstead, for example, we have 29,000 or more people, so there must be at least two sampling intervals in Hempstead. In other words, we must take at least two clusters in Hempstead, possibly three, depending on our random selection. The use of random numbers comes in at this point. Suppose that we have this situation, as we had, we took two clusters from Hempstead, and that accounted for about 22,000 in population. We have then some seven thousand of population left over from Hempstead which will enter into the later group influencing determination of the next cluster. Where that cluster will fall we determine in this way. We go to the table of random numbers here, at any designated place, perhaps it would be the last [fol. 266] number from which we took a number, we start there and we take the first number we come to, which is between zero and 10,979, first number we come to which is between those two, and let us say we are using five columns, of random numbers table, that will be the number at which we will select our third cluster.

Q. Have you told about the array which is a necessary concept in the application of random numbers?

A. I have mentioned we did array these towns from the largest to the smallest.

The Court: I think, if you will, instead of using towns there, I think your record will be clearer if you could use the word, communities.

The Witness: Communities or places.

The Court: Because we have the word, towns, meaning a specific area out here. Community or place, whichever you prefer. Where you mean town, say town, but where you do not mean town, perhaps you could say community or place, whichever suits your vocabulary.

By Mr. Grimes:

Q. These are incorporated communities, of 1000 or over that you are applying this process to, is that correct?

A. That is correct.

Q. Is it not a fact that you start in these incorporated

communities in excess of 1,000 persons, say from top to bottom, that is Hempstead with its 29 and some thousand and the next largest and the next largest down to those [fol. 267] which are just barely above 1,000 and then apply the selection of a particular community by application of random numbers, is that right?

A. By application of the sample interval together with random numbers.

The Court: There is one other thing. The witness was pointing to some pages in the book there when he spoke about random numbers, and he said as you find here. We do not have the book in evidence, or that page if it is important.

By Mr. Grimes:

Q. You have some pages of random numbers there?

A. You can put these in evidence.

Mr. Grimes: I want to offer these in evidence.

The Court: Link it up with this last answer.

Q. In applying random numbers to the area, from the largest community to the smallest community in the incorporated division of your work, I show you some documents and ask you whether these are typical of the random numbers you used to make the selection on the array?

A. Yes.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial.

The Court: I will receive them in evidence.

[fol. 268] Mr. Rollins: He made himself or is it something statistical?

The Court: He used them.

Q. Whose are they?

A. They are from Tibbett's.

The Court: Up to now, it does not matter. He used them.

By the Court:

Q. This is the group of random numbers you used when you made the determination that you had stopped at the number which you found between zero and 10,979?

A. Yes.

By Mr. Grimes:

Q. Where did Exhibit M come from?

A. It was torn out of a book similar to this of random sampling numbers by Tibbett.

Q. Could you state briefly who Tibbett is?

A. Tibbett is an English mathematical statistician.

Q. Does that book which you have in your hand contain a series of random numbers?

A. Yes.

Q. They are identical?

A. They are identical.

Q. With table five, six, table 17 and table 18 of random sampling numbers which comprise Defendant's Exhibit M, is that correct?

A. Yes.

Mr. Grimes: I ask that book be marked for identification for comparison purposes, but I do not intend at the moment to put it in evidence.

[fol. 269] The Court: Mark it for identification. I really do not see the necessity of it at the present time, but comply with your request.

Q. Is Tibbett a standard treatise used by mathematicians who have problems such as yours?

A. Yes.

Q. It is a widely known authority?

A. Yes.

(Book marked Defendant's Exhibit N for identification.)

Mr. Grimes: May the record show I have made the book available to the Attorney General for comparison, if he cares to do so.

By the Court:

Q. Just one question about these random sampling numbers. Are they compiled in just the way the name implies, taken at random?

A. It is the most perfect random group of numbers that we know of.

Q. Would you give us a definition? For instance, what random numbers, the way you have been using it in your testimony here recently, what is the definition of that expression?

A. I would say a table of random numbers is a table in which no matter what systematic means you use for analysis you cannot come out with biased results, the same number of zeros, the same number of 1s, 2s, so on will show you, no matter what systematic order you use for select- [fol. 270] ing them. There will be no pattern of what we call bias.

Q. So that this table of random sampling numbers is really studiously and carefully set up to accomplish that purpose which you have just stated?

A. Exceedingly so.

By Mr. Grimes:

Q. You know how those random numbers were compiled. Will you state briefly the mathematical process by description?

A. They were compiled by using census data obtained in England in which it is my understanding they used the 17th place of logarithms, of numbers and it was that 17th number from a series of logarithms that was used for the selection of these particular numbers. That, I should say is hearsay evidence on my part. I do not know that for a fact.

Mr. Rollins: The purpose, however of selection, you have to have some means of trying to get randomness, is that correct to make—I understand this witness said he made a stratification survey using the random method. I am confused more so than I ever was. He made a distinction between random and stratification survey. He said the

random survey is what the Literary Digest used, and it was not scientific. Now he says he has used random logarithms.

The Court: That would be for cross examination.

[fol. 271] Q. In your opinion is the use of random numbers more accurate for the purpose you are endeavoring to obtain, or less accurate, than if some machine had been used?

A. The use of random numbers is more accurate than if any kind of a machine had been used because in the use of any machine there is always some very slight bias that comes up.

Q. When you say bias, that to lay minds like myself imports a mental operation. When you say bias in connection with a machine designed to develop complete hazard what do you mean?

A. I mean there will be some slight variation from what is perfect representation.

Q. Because of mechanical imperfection, or inability to make machines mechanically perfect?

A. Inability to make machines mechanically perfect.

Q. In your opinion, does the system of random numbers produce greater randomness or greater hazard than any machine that has been devised?

A. Yes.

Q. Will you continue with the explanation of the process by which you made an array of incorporated communities of over 1,000 in Nassau County?

A. I was speaking of the selection of the third cluster. In Hempstead, actually the third cluster should fall in Hempstead because the random number that we found when we went to the table was less than the 7,000 population that was left over. We had also several other cities, several other localities which were larger than 10,979, so automatically they received at least one cluster, some of them also received two, and among these were, I believe, [fol. 272] Mineola, Garden City, Valley Stream and one or two others.

Q. Is this true, and I think this might shorten the testimony on the process of random numbers, you went from the highest to the lowest in incorporated communities of

over 1,000 in Nassau County until you had 27 clusters in the incorporated community division.

A. Did you ask me, if that is true?

Q. If not correct, please correct me.

A. No, it is not correct.

Q. Correct me and state what is the fact.

A. The correct point is each time we had to apply the sampling interval—

Q. That is 10,000?

A. That is 10,000, if we took a place where 10,979 persons lived, then that would not give an equal chance for all of those in between zero and 10,979 in this interval to fall. It becomes particularly important when we come to selecting the very many small towns, small communities I should say. Here we may find when we get down to communities of 2,000, let us say, we have to accumulate communities before we get to make up our interval, so in order to give each one of those communities an equal opportunity of falling each time we have to start with a random number, we have to select some random number between zero and 10,000 and wherever that number falls that town or that community would be selected, so that each of your communities therefore has equal probability of being selected in the sample.

Q. Because the random number might fall any place within the range of zero to approximately 11,000 people, which you call the interval; that is correct.

[fol. 273] The Court: He said yes.

Q. Will you go ahead, please.

A. This is the array we used for the selection of communities in which we are going to—

Q. That is incorporated?

A. That is incorporated communities which we are going to use in our sampling. We next had to select the unincorporated. In the unincorporated areas we have no data that tells us the population of the people; we have our data which only tells us the population of the structures; here again we make up an array which starts from the letter A and goes on down and we just mass those in order together with the total number of dwelling units which are—in each of these; you determine the total number of dwelling units

in the so-called psuedo town as we have called it, or an interviewing area, unincorporated area, just by physical count. They work through there and count every structure that falls in that area.

Q. I show you Exhibit J and ask you to point out to the Court just what you did in this connection?

The Court: He does not know, except we will assume you have the exhibit. Look on that Exhibit J.

The Witness: You can see we have counted every one of those, and we have also divided up into very small parts which were given numbers, were recorded, and the number of households in each one of those, each sub-division was determined as you can see by the sheet showing clusters, a cluster and size in area N.

[fol. 274] Mr. Grimes: May I have the exhibit, please?

Q. What do you call this sheet which you have just—

A. (Interrupting:) That is the cluster sheet, the cluster list.

Q. What is the sheet attached?

A. That is just the manner in which we used them, selected the cluster or we had skipped each of these until we got to the proper cluster, but I am not ready to talk about that just yet.

Q. Will you go ahead, please?

A. In selecting the unincorporated areas in which we would interview we again developed the sampling interval, but the sampling interval this time had to be in terms of dwellings and the sampling interval came out to be 3,040 dwellings.

Q. How did it happen to come out at that figure?

A. That is the total unincorporated divided by the number of clusters that are allocated to unincorporated, which is 32—32, right.

Q. Then the allowance made for the number of persons—

A. That is taken care of subsequently when we list—

Q. I meant in so far as the figure is concerned, we have an interval of 11,000 almost for incorporated?

A. Yes, that 11,000 interval, that is 11,000 people, that is comparable to 3,040 dwellings, but we do not have statistics on people in the unincorporated places, communities.

Q. Will you explain how you arrived at the figure 3,040. Does that have some relation to the number of persons per dwelling unit or how much?

A. We are not concerned with the persons, number of persons per dwelling in the determination of this figure. [fol. 275] We counted the number of structures that looked like dwelling units in the aerial photograph; we divided that number total by 32 which is the number of interviewing areas to be selected for the unincorporated, and that gave us a sampling interview of 3,040. We are not concerned at this point with the population, with the number of people at this point; that is determined later. First, we can deal only with the population we have, and the population we are concerned with, and the only thing on which we have any data by towns are dwelling units which we developed from aerial photography; in the selecting of areas we used exactly the same procedure we used in selecting interviewing places.

By the Court:

Q. Give it the way you want it.

A. In selecting an interviewing place in an unincorporated area we used the same general principles we used in selecting interviewing places in incorporated areas; we make up an array of pseudo towns or areas, starting with A, B, C, D, so on, then we start with a **random number** between zero and 3,040, and wherever that random number falls, that area is the first that is designated for an interviewing place. Then we used the sampling interval and random number for each succeeding one until we get our total of 34 interviewing places in an unincorporated area. At this stage we have selected the communities in which interviewing is to be done, and we have selected communities, we have—given each of these equal probability of falling; [fol. 276] we next have to select areas within the community and again we use a mathematical procedure. To go back to incorporated areas now, we take each of these towns that have been selected and we go through and divide it up into small clusters, and the clusters average in size about 25 to 30 dwelling units in a cluster, and we just go through the whole community and

divide it into these small clusters, put a number on them and make a list such as this one here for Glen Cove, in which we have a number of clusters and the number of dwelling units in a cluster; we make up this cluster sheet then for Glen Cove.

By the Court:

Q. Let me ask a question. Hold on to your train of thought. Where do you get the clusters to draw from?

A. Mark them. Just look at this map.

Q. Still returning to the map.

A. Using the aerial photograph we draw in on the aerial photograph.

Q. You use the aerial photograph map?

A. That is right, and then we have the same data for every one of the towns that have been selected. Well, now—

By Mr. Grimes:

Q. Pseudo towns at this point?

A. I am now talking about incorporated areas. Our purpose then is to give every one—actually we want every person in this town to have equal probability of falling in the sample, so we have to select our cluster with mathematical procedure to avoid using any judgment; all clusters must have an opportunity of falling. We know that there are—we know the number of people who live in this town, and we know the number of dwelling units in the town.

Mr. Grimes: Could we have a five minute recess at this point? He has been testifying a long time.

Q. Will you please give a little fuller explanation of the subject which you just discussed? Please. First of all there was the number I believe you wished to correct?

A. That is right. It has been called to my attention I have said above there were 32 and 34 clusters for interviewing in the unincorporated area. The figure is 32 interviewing places in the unincorporated area. In the development of arrays both for incorporated and unincorporated it is necessary to actually make a physical array,

and I should like to say to the Court these physical arrays were made for incorporated areas. This is simply how we make it; we start with Hempstead and each of these which are more than 10,979 necessarily has to fall, then we make our array of other towns in the townships, and the ones which are checked here in red are the ones in which a cluster is formed.

By the Court:

Q. Let me ask you a question. For instance, take Cedarhurst on this paper, in red we have the figure 2110.73. [fol. 278] What is that?

A. .73 point means nothing. The 2000 that is, where is the figure?

Q. Right there.

A. That means 211,073 people have been accumulated up to this point; the accumulation starts right here. The black figure is the number of people residing in that particular locality, community.

Q. How do you read that, for instance in Cedarhurst you have 60.21.

A. That is right. There are 6,021 people living in Cedarhurst. It just happens to be our adding machine is used also for dollars and cents, but the decimal point means nothing.

Q. The point can be disregarded entirely?

A. Disregarded.

Q. What does the 1 in a circle mean?

A. It means there was one extra taken from there.

By Mr. Grimes:

Q. How did that cluster happen to be taken from there?

A. Because that was where the person represented by the random number—that was the town in which he fell, in which he lived.

Q. You applied the process of random numbers to that array generally?

A. That is right, using the random number between zero and getting the total sampling interval.

The Court: Maybe this would be a good point to put in evidence this table.

Mr. Grimes: I offer what has been described by the witness as an array sheet in evidence.

Mr. Rollins: I object upon the ground it is incompetent, irrelevant and immaterial, and no proper foundation has [fol. 279] been laid.

The Court: I will receive it.

(Paper received in evidence and marked Defendant's Exhibit O.)

By Mr. Grimes:

Q. Did you have a similar array sheet for the unincorporated places?

A. Yes.

Q. Did you use the same process there?

A. I used the same process there except the population is that of dwelling units instead of people.

Q. The interval is therefore smaller?

A. Smaller intervals.

Q. The same principle is applied, same process?

A. Correct.

Q. Are these sheets available for inspection?

A. Yes, they are.

Q. You have them in court?

Mr. Grimes: Very well. I offer them for inspection if anyone cares to inspect them.

Q. Proceed, please.

A. The next stage in the development is the selection of the particular area in which we are going to interview. We have made out, we have developed small clusters of about 20, 25 dwelling units for all of the areas in the incorporated area in which we are going to interview, and all of the unincorporated area. Suppose that, well, Cedarhurst were a place in which we were going to select a cluster.

[fol. 280] Q. Suppose Cedarhurst came up by application of random numbers in the array.

A. That is right. It has about 1300 dwelling units. We would then, to pick a particular cluster in which interviewing is to be done, we would select a random number between zero and 1300, and wherever that supposedly random number—suppose the random number is 500, we would start

accumulating clusters, starting with cluster 1 and add to it the number of dwelling units in cluster 2, the number of dwelling units in cluster 3, so on until we had accumulated 500 dwelling units, and whatever cluster that 500th dwelling unit fell in, that would be the cluster we would use for interviewing in that community.

Q. When you say that is what you would do, do you mean——

A. That is the way it was done.

Q. You did it?

A. That is the way it was done.

Q. That is an accurate description of the process you individually did use, is that correct?

A. It is the process, but the number, 500 I have just taken out of the air.

Q. But that is the process?

A. That is the process.

Q. You did use in selecting the interview area?

A. That is correct. And the same process was used in unincorporated as well as incorporated.

Q. Would it be convenient for you to take Glen Cove as an example and demonstrate that process?

A. Yes, it would.

Q. Would you need Exhibit J?

A. It would help, yes. In Glen Cove, according to our sheet here, the cluster that was selected should have been cluster 95 in which there should be 39 dwelling units.

[fol. 281] Q. Exhibit I, if you will wait just a minute, which is Glen Cove, I would like you to make the process a little clearer to us all.

A. You can see here that Glen Cove is divided up completely into these small clusters and the clusters are numbered and we enter the numbers of the clusters and counted the number of dwelling units in the cluster and we list these on here, as I explained before, then we accumulate clusters from 1 until we arrive at the number which was the random number, and I can tell you——

Q. First you refer to our Exhibit I in evidence. Now, you have in your hand a series of pieces of paper, have you not?

A. Yes.

Q. What are those pieces of paper which you have in your hand? If you will, describe them briefly.

A. These are sheets which are a list of the clusters in Glen Cove, showing the cluster, number of the cluster and number of dwelling units in each cluster.

Mr. Grimes: I offer those in evidence as what was in fact done in the City of Glen Cove.

By the Court:

Q. These were prepared under your supervision?

A. Under my supervision, yes.

Mr. Rollins: Objected to, incompetent, irrelevant and immaterial, no foundation having been laid therefor. It is hearsay.

The Court: When you bring in incompetant again we will [fol. 282] have to go a little deeper, but if you will pass up the competency—

Mr. Rollins: I cannot waive it. I do not see how I can do it. It is absolutely hearsay.

The Court: I would have to sustain the objection unless the correctness of those figures can be in some way established.

Mr. Grimes: I will ask a few more questions. May we have this marked for identification so I may refer to it, please?

The Court: Yes, mark it for identification.

(Paper marked Defendant's Exhibit P for identification.)

Q. On this sheet, being Defendant's Exhibit P for identification I call your attention to a series of columns numbered from 1 on the first sheet to 100 where the series of figures under the heading D-U underneath and opposite each number 1 to 100. Would you please explain to the Court what the figure, for instance, 1-D-U opposite it means?

A. It means—

Mr. Rollins: That is an attempt to read from a document not in evidence.

The Court: He is just defining. He is not reading from it.

The Witness: D-U means dwelling units. In cluster 1, in Glen Cove this says——

The Court: They are not asking you for that purpose now, Professor. Well, he says D-U means dwelling units.

[fol. 283] By Mr. Grimes:

Q. Opposite number——

The Court: The next question would be where did he get the figure.

Q. Have you had occasion to check the figures under D-U against the matter, you, yourself?

A. I have checked some.

Q. Are those that you have checked accurate?

A. Quite accurate, maybe within one dwelling unit in a cluster off, but most of them exact.

Mr. Rollins: That depends on your official inspection.

The Court: That is enough on that. He physically did that himself.

Mr. Grimes: I offer it in evidence.

The Court: Are you not just dealing with one column, or are there more?

The Witness: (No answer.)

By the Court:

Q. Mr. Grimes asked you about the second column under the initials D-U. There are other columns there. What do they mean?

A. They mean the same thing in each case. This is the first 25 clusters, here is the second 25, or 26 to 50.

Q. So those beginning with the column on the left side are rotation numbers of the clusters?

A. That is right.

The Court I will receive it in evidence.

Mr. Rollins: I object to it on the ground specified, not limited to the contention, and it is based on hearsay; not [fol. 284] accumulated by this witness, but given to him by somebody else.

The Court: I will receive it.

(Received in evidence and marked Defendant's Exhibit P.)

Mr. Grimes: These various sheets I suggest be marked as one exhibit.

The Court: Yes.

By Mr. Grimes:

Q. Have you produced in court by the way, by what name you designate sheets such as are exemplified by Exhibit P?

A. The cluster list.

Q. Have you produced in court the cluster list for the entire County of Nassau?

The Court: By the various communities.

Q. All those communities selected by the process of random numbers.

A. Yes.

Q. What type sheets do you have? Representing what?

A. Representing incorporated and unincorporated.

Q. Wherever random numbers produce a cluster to be taken?

A. That is correct.

By the Court:

Q. Are they generally the same as Exhibit P?

A. Yes.

Q. The figures are different?

A. The figures are different.

[fol. 285] Q. Methods?

A. Are exactly the same.

Q. But the recordings are for the same purpose?

A. That is right.

By Mr. Grimes:

Q. I show you a file and ask you whether this includes the cluster sheets for your entire survey? If you will, look that over.

A. I would say that it does.

Mr. Rollins: Would it help in expediting this trial. Inasmuch as he testified to one cluster sheet in one community

I am willing to stipulate the testimony would be the same in other communities, reserving all my objections to the competency of the evidence and also as to exhibits.

The Court: And correctness?

Mr. Rollins: And correctness.

Mr. Grimes: Thank you. I will accept the stipulation.

Mr. Rollins: All these exhibits, dealing with the plan, not of its execution.

Mr. Grimes: Both plan and execution.

Mr. Rollins: You mean they had already been executed?

The Court: This is what they did.

Mr. Grimes: This is both plan and execution.

The Court: Plan, and plan executed as he moves along his testimony.

Mr. Rollins: Subject to my objection, all this testimony is not competent, relevant or material. Particularly I limit [fol. 286] it to the contention of the conclusion based thereon, as an expert is based on hearsay testimony on facts furnished by somebody else in which he himself did not participate.

The Court: He participated in supervising. We have not got to that yet. How did you want that marked? You have the stipulation.

Mr. Grimes: I accept the stipulation and I merely want the record to show we have produced them all in court for inspection by the Attorney General, and we accept the stipulation in that respect.

the select or fall numbers as you might say, with the various clusters are now established.

The Court: So that now you have passed the point where

The Witness: That is right. I have selected now all of the places where I am going to do interviewing.

The Court: Go ahead, we will hear a little bit more. Proceed on. You say there is still further?

The Witness: In developing our clusters we have dealt with aerial photography. These photographs were taken in April of 1950. Our study was made in November and December, 1950. There is a possibility that there is some error in our dealing with aerial photography, for two or three reasons; first, there may have been more buildings built in the given clusters since April, 1950; secondly, what

we may have thought looked like one family dwelling units were actually structures which may be two or more family [fol. 287] dwelling units, or maybe they were a garage. So in order to be sure we make no mistake on this and sure we take into account changes that occurred in population, we send out people whom we call pre-listers, to each of the clusters; and his function is to make a record of every dwelling unit in the designated clusters; and he is, the pre-lister, given a map which showed the man exactly where to go, where to start, and was given a sheet on which he listed all of the dwelling units. We have incorporated all of those pre-listing sheets and—

Q. You have one of them with you there?

A. I have here an example of pre-listing for Glen Cove. These people went out to a cluster in Glen Cove, and this is the map we gave them, which outlined that cluster. This shows them exactly where to go, and it is as you start here, and you go around the block in this fashion, then you come over here on this side of the street, around here and you end here, that is the end of the cluster, and he follows that and he makes a list of every dwelling unit that he encounters in going around this cluster. There may be a store on the first floor, but there may be a dwelling unit in back. He has to go and find out whether or not there is a dwelling unit in back, so we are sure we represent every dwelling unit that is in this block. This then eliminates any possibility we have made error or underestimated an area because the conditions of the map were different.

[fol. 288] By the Court:

Q. You said that he should. Did he actually do those things, pre-list?

A. I am sorry. I should have said he did.

Mr. Rollins: I object, hearsay on the ground what the other fellow says he did.

The Court: I will take it.

Mr. Grimes: I would like to offer those in evidence, one of Glen Cove.

The Witness: I have also Levittown.

The Court: We will take one first. It is offered. Same objection?

Mr. Rollins: Offered for what?

The Court: The witness has referred to it in his testimony. It is the pre-listing report that he testified to.

Mr. Rollins: I object upon the ground it is incompetent, irrelevant and immaterial, specifically based on hearsay evidence.

The Court: I will receive it in evidence.

(Paper received in evidence and marked Defendant's Exhibit Q.)

The Court: Now, might we ask you, Professor—

By Mr. Grimes:

Q. You have similar cluster sheets made of the entire area which was indicated?

A. For every area interviewed.

The Court: Pre-listing sheet?

[fol. 289] Mr. Grimes: Pre-listing sheet.

Mr. Rollins: Objected to, sample.

The Court: Yes, all subject to your general objection.

Mr. Grimes: I understand he objects on the grounds of incompetency, irrelevancy and immateriality?

Mr. Rollins: I will concede the witness will testify he made a similar pre-listing as evidence, without stipulating the correctness of it, of the facts stated by the witness, and without waiving my objection and the right to object to its admissibility, claiming it is incompetent, for the reasons advanced.

Mr. Grimes: This covers the entire area which was interviewed.

The Court: Yes.

Mr. Grimes: Will he make the same stipulation.

Mr. Rollins: As to entire Nassau County. He wants me to stipulate not specifically Nassau County, but the area covered by maps. I even go beyond it by saying all of Nassau County whether on the photographs or not.

The Court: That includes what you wanted?

Mr. Grimes: Yes. This Exhibit Q is the pre-listing sheet, is that correct?

The Witness: Yes.

By Mr. Grimes:

Q. What was the next step after that in connection with the survey?

A. (No answer.)

[fol. 290] By the Court:

Q. That evidence about Exhibit Q was just to pick up a possible error resulting from changed conditions, from the time the photograph was taken in April and the actual interview was done, did you say November, December?

A. November and December.

The Court: He wanted to cover that possible opening for error.

The Witness: The possibility, also, Judge that we may have counted something as a dwelling unit that was not, or there may have been more dwelling units in the structure than we thought there were.

By the Court:

Q. It is an absolute physical viewing of houses?

A. Exactly, so that we know now the number of dwelling units in each of the clusters.

Q. There is some other point you want to develop?

A. Yes. We now have to select dwelling units within the cluster in which we are going to interview. As I pointed out earlier, the chief aspect of design of this is that every person twenty-one years of age or over in the population of Nassau County, shall have an equal chance of being selected in the sample; some clusters varied in size, so the probability that any cluster would be selected when we were selecting the cluster in which we were going to interview, the probability any cluster would fall depends on its size; in other words, the larger one had a bigger chance of falling than a very small one, so if we took every household [fol. 291] in the cluster, then it would mean every household in the big cluster also had a big chance of falling, so we have to compensate for the big cluster by taking a smaller number of households in the cluster, and so we had to calculate for each of the clusters, we calculated the percent of households in which we were to interview. That meant then that in most of our clusters we had to eliminate certain

households, and in eliminating them we had to do that in such a way that every household in the cluster had an equal opportunity of remaining in the sample, of its being in the sample; in other words, we did this, suppose, and I will have to give you a supposition, say 80 percent of the dwellings that we were to interview, 80 percent of the dwelling units in the cluster—

Q. Will you please proceed?

A. I was discussing the manner in which we selected the dwelling units within the cluster that were to fall in the sample. I will use, if I may, Glen Cove further as an illustration. In Glen Cove about 75, actually 74 percent of the households in Glen Cove, in the cluster in Glen Cove, were to be used for interviewing, so we had to eliminate 26 percent of them, so that is actually roughly one out of four, so we selected this random number between zero and the total number of dwelling units that are in the cluster, and wherever that random number comes, that is where we start in our elimination; that first one, the one has a random number would be eliminated. We will go then, since one out of four is to be eliminated, we will go down to the fourth [fol. 292] household below the one that was selected by the random number, eliminate that, and then eliminate every fourth one beyond that. By starting with the random number we give every household in the cluster an equal probability of remaining in the cluster and we did that, as you may see here, in Glen Cove. Here is the list of dwelling units, and you will see every fourth one, roughly, in one case you will find perhaps there is three to interview, say actually 3.9 instead of four, so we always accumulated the 3.9 instead of four, so that after we have accumulated several of these the interval will be three instead of four and then it will return to an interval of four.

By the Court:

Q. You have indicated those particular dwellings on this Exhibit Q by a circle with an X in it?

A. Those are the ones that are to be eliminated.

Q. In lead pencil?

A. That is correct.

By Mr. Grimes:

Q. You repeated that process where interviews were to be taken?

A. That is correct.

Q. All 60 of the interview clusters?

A. Yes. Those are available here in court, too.

Q. You have those with you; all other sheets of similar import are here in court?

A. Yes.

Mr. Rollins: I will stipulate the same thing was done—I will stipulate the witness will testify the same thing was [fol. 293] done with respect to other areas throughout the entire area of Nassau County as testified by this witness, without stipulating the truth thereof; and further reserving my right to object to the testimony so stipulated upon the grounds heretofore urged, that same are incompetent, irrelevant and immaterial, and that same deal with matters of hearsay.

The Court: All right.

Mr. Grimes: May the record show all 59 similar documents are in court?

The Court: I think we ought to stop at this point for the day. Tomorrow morning.

Mineola, New York,
January 30, 1951.

Trial Continued

MATTHEW CHAPPELL, resumed the stand, having been previously sworn, testified further as follows:

Mr. Grimes: I would like first to make sure we have all our exhibits in order which relate to the Hofstra survey. That will take just a minute.

Direct examination.

By Mr. Grimes (Continuing):

Q. Professor, before continuing I show you a document and ask you to state merely by description without reading [fol. 294] the content, what this document is.

A. That is the array which we made up for unincorporated areas.

Mr. Grimes: I ask that be marked for identification.

The Court: Mark it.

(Paper marked Defendant's Exhibit R for identification.)

The Court: Why not mark it in evidence, instead of having it marked twice?

Mr. Grimes: I am going to call a witness shortly and I will put it in after calling that witness.

Q. Will you please proceed with your testimony, Professor?

A. We concluded, I believe, yesterday with the selection of dwelling units in each cluster. That was the last thing we discussed. After we have selected the dwelling units, the next step is to assure that each individual in the dwelling unit, in selected dwelling unit who is twenty-one years of age or over has an equal probability of being selected. If we had taken one respondent from each dwelling unit we have developed a bias in that we would have a much larger percentage of people from smaller homes, that is where there was one or two adults than we would have had from homes where there are three, four, five or more adults. In order to assure that we eliminated any such bias as that we used a technique in which we had the interviewer, when he went to the door, the first question he would ask was,—

[fol. 295] Mr. Rollins: I object. That would be purely hearsay. He testified he gave those instructions.

The Court: Yes. You gave those instructions.

The Witness: The interviewer was instructed to ask how many people there were in the home who were twenty-one years of age or over, and to list those first; male head of the household was listed on the first line, if there was a male head of the household, and the female head of the household on the second line; other males over twenty-one years of age or over following that and in order of age and other females over twenty-one in order of age. To assure that each person had an equal probability of being selected we made up these three sets of sheets which I will explain to the Court here. On one sheet there are ten, ten lines on

which we could list adults in the family, and we found no families in which there were more than ten adults, those adults were designated for interview who fell on each of the lines that were circled, and we used three forms; on one form line 1, 4, 7 and 10 were circled, on a second form line 2, 5 and 8 were circled, on a third form line 3, 6 and 9 were circled. These sheets which we call face sheets were attached to each interview, the order in which—

By the Court:

Q. Those face sheets are practically questionnaires?

A. Questionnaires, just to find out what people of twenty-one years of age and over are.

[fol. 296] Q. Did you say this sheet was the face sheet?

A. No, this is the questionnaire. This is the face sheet.

Q. The top sheet would be the face sheet?

A. Surely. If we were using this face sheet where lines 2, 5, 8 are circled, and we found that there were two adults in this household that the interviewer found, he was instructed to interview the person who fell on the second line, if he was using this form.

By Mr. Grimes:

Q. When you say, if, you mean—

A. (Interrupting) When.

Q. You are describing what you actually did?

A. I instructed interviewers to do. He was instructed when he was using this form and he found a household in which there was only one adult, there would be a name only on the first line, there would be no name on the line circled, so there would no interview taken in that household. Of course, if he was using the first form where line 1, 4, 7 and 10 are circled he must take at least one interview if there was one adult in the household which there has to be in every case.

By the Court:

Q. In other words, if you found no adult to conform to the circled figure, then was no interview in that dwelling?

A. That is right. Similarly, if there were two individuals

in that household who fell on the circled line as if, for example, if there were four in the household, and we were [fol. 297] using the form with one, 4, 7 and 10 circled there would be an adult fall on line 1 and line 4, and both then must be interviewed.

Q. What was the purpose of that procedure?

A. The purpose of this was to ascertain that every member of the household who was twenty-one years old or older had an equal probability of being interviewed, and no more than an equal probability.

Mr. Grimes: I offer these in evidence.

Mr. Rollins: That is objected to, incompetent, irrelevant, immaterial. That is the basis of my objection at this time.

The Court: I will receive them in evidence. Marked as one exhibit.

(Papers received in evidence and marked Defendant's Exhibit S.)

By Mr. Grimes:

Q. Proceed, please.

A. There is one more possible source of bias which we designed our sample to control, and that is bias which might be created by interviewing only those people who are at home when the interviewer calls the first time. If we had taken such a sample we would have had for the most part women, because the men are more often not at home.

By the Court:

Q. Is not that eliminated by your last forms?

A. That eliminates in part. Now I want to point out the interviewer has to go back until he gets the person who is [fol. 298] indicated. He cannot just go once.

Q. I think if you make that statement, that he must go back and get the person who falls within the circled number?

A. That is right.

Q. He does not just interview the person who answers the bell?

A. That is correct. We made five attempts to get the person who did fall on this line; in other words, the original interviewer, if he did not find him, then he went back at least four times, and of course, many were found before he

went back four times, but all together there were five attempts made to get every individual.

Q. You instructed him to make that many attempts?

A. That is right. That completes the direction for the development of the sample, and of the method.

Mr. Grimes: I would like to suspend the interrogation of the Professor at this point for the purpose of putting on Dot Counters, putting on every lister, putting on interviewers and putting on tabulators.

The Court: I think you can do that.

Mr. Grimes: And recall Professor Chappell later.

The Court: Any objection?

Mr. Rollins: Not at all. I had suggested—

The Court: Maybe we can find a pattern where we could just examine a few and have a stipulation with respect to the others.

Mr. Rollins: That is my idea. May the record show I [fol. 299] reserve my right to cross examination?

The Court: Yes. Anyway the direct examination is not complete.

HILDA BARNES, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 45 Tudor City Place, New York City.

Q. Will you state what your education has been, degrees?

A. B. A., University of Michigan.

Q. What year?

A. 1942.

Q. What did you do after receiving your B. A. degree, by way of jobs?

A. I worked in the research department of an advertising agency.

Q. What agency is that?

A. Kenyon & Eckardt.

Q. Where are they?

A. That is New York City.

Q. For how long?

A. Three years.

Q. What years were those?

A. 1943 to 1946.

Q. After that where did you go?

A. I worked for Alfred Politz Research, Inc.

Q. Politz?

A. Yes.

Q. For how long?

A. A little over three years.

Q. What years were those?

A. 1947 to 1950.

Q. What did Politz Research do? What was their business?

A. They conduct polls for surveys.

Q. What did you do with Politz?

A. I worked in the sampling department.

[fol. 300] Q. You have done a number of samples prior to working on the Hofstra sample?

A. Yes.

Q. You did work on the Hofstra sample?

A. Yes, I did.

Q. How many samples had you worked on for Politz, just approximately how many?

A. I honestly don't know in numbers. I did over 20 I would say.

By the Court:

Q. A week, a month? Could you give it that way?

A. (No answer.)

The Court: Over 20, that is good enough.

By Mr. Grimes:

Q. In connection with the Hofstra survey will you state please, what you did?

A. I worked on the sample, well, selection of the communities; I counted, I put a photograph together and worked on counting a portion of the households.

By the Court:

Q. Did you have some title in the setup?

A. No, I don't believe so.

By Mr. Grimes:

Q. I show you Defendant's Exhibit I in evidence, being aerial photograph of Glen Cove City, cluster No. 15 and ask you whether you did work in connection with that cluster?

A. Yes, I did.

Q. Would you state to the Court what you did, please?
[fol. 301] A. I put the various photographs together, then outlined Glen Cove from another map showing its boundaries, then I counted clusters.

Q. With specific reference to counting clusters state what you did do.

A. I started in one corner of the photograph and counted blocks each of dwelling units I could see from blocks.

Q. From the aerial photograph?

A. Yes, then—

Q. Just for the record, did you count them accurately?

A. As accurately as I could.

Q. What was the next step?

A. I numbered each block on the photograph and I put a corresponding number on the cluster list sheet, and entered the number of dwelling units.

Q. Proceed, please.

A. I counted any specific block or area on the cluster sheet.

Q. I show you Exhibit P in evidence and ask you if that is the document which you worked with or from?

A. Yes.

Q. Would you state to the Court what you did with reference to that?

A. I entered the counts for each of the clusters on this count sheet, then this sheet was totaled and it was divided into clusters, each cluster having at least 25 dwelling units, so that would be one cluster and two and three would go together, and that would be one cluster, and combined them so each one had at least 25 dwelling units, and I selected

a random number between zero and the total number of dwelling units in Glen Cove.

Q. Then what?

A. Then I accumulated the clusters, added the clusters down until I found the cluster which had been selected to be interviewed.

[fol. 302] Q. You found that by a process of random numbers?

A. Yes.

Q. You did that work yourself?

A. Yes, I did.

Q. I show you Defendant's Exhibit R for identification and ask you to describe to the Court what that is, and then state what you did, if anything, in connection with it.

A. That is an accumulation of unincorporated areas; unincorporated areas had been divided into, I don't remember the exact number of parts, and they were lettered pseudo towns, lettered A through N and I guess there were some extra letters in there, too; this was just an accumulation of those areas that had been counted from the photograph.

Q. Did you do some of that counting yourself?

A. Yes, I did.

Q. It appears on that exhibit?

A. Yes.

Q. Did you check the total?

A. Yes, I did.

Q. Did you apply a process of random numbers to it?

A. Yes.

Q. Those then became clusters?

A. Ultimately became.

Q. Part of the sample?

A. That is right.

Q. You did that work yourself in that exhibit R?

A. I worked with this, well, yes, I worked with this sheet.

By the Court:

Q. With respect to this Exhibit R, what is that 399?

A. Area we designated as A we counted 399 structures.

Q. You did that by inspecting the aerial photograph?

A. Photograph, yes.

Q. Then B?

A. In B, after we designated the area there were 3,245.
[fol. 303] Q. You designated B and counted again?

A. Yes. See, we designated all the areas before we counted.

Q. Then I notice you add these as you go along so when you finish you have a total of the dwellings you counted?

A. Yes.

By Mr. Grimes:

Q. Did persons other than yourself, also do dot counting?
A. Yes.

Q. Was the process similar, if you know, to the process you went through in dot counting?

A. Yes, it was.

Q. You know about how many other persons there were who did dot counting process in connection with all the dot counting that was done and in connection with sampling?

A. I would say about 12.

Q. Were they Hofstra students for the most part?

A. Yes, they were.

By the Court:

Q. Did you watch them do their work?
A. Yes.

Q. Did they do it, as far as you could see, in the same manner you were doing your work?

A. Yes.

Q. They kept the same records?

A. Yes.

By Mr. Grimes:

Q. Did you supervise their work?
A. Yes, I did.

Mr. Grimes: I now offer Defendant's Exhibit R in evidence.

[fol. 304] Mr. Rollins: I object to it upon the ground it is incompetent, irrelevant, immaterial, serves no issue and has no probative value at all.

The Court: I will receive it in evidence.

(Defendant's Exhibit R for identification was received in evidence and marked Defendant's Exhibit R.)

Mr. Rollins: I reserve all objections, because as I have maintained, the poll system——

The Court: Yes. We have that in mind. You need not repeat that.

Mr. Rollins: There is another ground I intend to bring out on cross examination.

By Mr. Grimes:

Q. I show you Defendant's Exhibit O in evidence and ask you to state what you did with reference to that, please?

A. Using the preliminary census report——

Q. First, what is that?

A. That is an array of incorporated towns over a thousand in Nassau County.

By the Court:

Q. When you say towns, again you mean communities?

A. Communities.

By Mr. Grimes:

Q. Yes.

[fol. 305] Mr. Grimes: Excuse. I would like to ask one question preliminary to that.

Q. Defendant's Exhibit R represents, does it not, all of the unincorporated areas in Nassau County?

A. Yes.

Q. And the exhibit which you have in your hand is O in evidence, represents incorporated, is that correct?

A. All but one. This represents 27 clusters.

Q. All but one cluster? What is the other cluster?

A. That cluster is one that is in a town that is under a thousand population.

The Court: Community, you mean.

The Witness: I am sorry, community, and was not in the census preliminary report.

By Mr. Grimes:

Q. Is that reflected or not in unincorporated areas represented by Exhibit R?

A. No, it is separate.

Q. Will you state please, what you did in connection with the exhibit number in your hand?

A. From the census report I selected all towns that had more than an approximately 11,000 population, because they were pre-selected, and I accumulated those towns—

By the Court:

Q. That figure was 10,975, was it?

A. That is right.

Q. Let us adhere to that figure.

[fol. 306] A. That accounted for 195,066 in population. The rest of the population was divided into three townships, the rest of the incorporated population, with communities over a thousand, and then those townships, towns were arrayed from high to low.

The Court: I do not think the young lady has stated that as well as she could. If you would tell us, in answer to Mr. Grimes' question, what did you do with respect to Exhibit O? How did those figures get on there? Make it a more detailed answer. You have a large wealth of knowledge about this subject, and the rest of us do not, so you may go more into detail.

The Witness: Surely. From the census reports, the census reports list the incorporated communities over a thousand and I selected the towns that had a population—

The Court: Towns? Will you avoid that word?

The Witness: I am sorry. Communities that had a population of more than 10,979 people, and I added those on this tape starting with towns with the largest population and going down to one with the smallest population.

By the Court:

Q. You meant towns there, did you?

A. No, I am sorry again, I meant communities. That accounted for 195,066 people. The balance of the population in the incorporated communities was then divided into three

[fol. 307] townships, Hempstead Township, North Hempstead and Oyster Bay, and then those townships, the communities were then accumulated starting with the community with the largest population and going down to the community with the smallest population.

Q. When you say community in a town do you mean village?

A. Yes.

Q. The village is incorporated?

A. Incorporated area, it would either be a city or village within the Township. First, we accumulated communities with Hempstead Township.

By Mr. Grimes:

Q. When you say accumulated, you mean you added the population of one to the other?

A. That is right, net total for each, after each town was added.

Q. Go ahead, please. Then you applied random numbers?

A. Then we applied—we divided the total population into your 27 parts and using and 10,979. We took a random number between 0 and 10,979, to determine where our clusters were, in what communities our random number fell.

Q. What did you do with reference to the survey?

A. (No answer.)

By the Court:

Q. That would be a selected cluster?

A. Yes, that was a selected community. And by that we determined, well, a town like Hempstead, they had 29,000 people, had three random numbers that actually fell within that town, and therefore got three clusters.

[fol. 308] By Mr. Grimes:

Q. But where the random number fell, that became a cluster, and from that you worked out the place in which the interview was taken, is that right?

A. Yes.

RECESS TO 2 P. M.

Mr. Grimes: We have available all the other counters and we can call them and get their testimony, establish that they carried out their instructions by counting dots in these clusters.

The Court: Substantially the same as Miss Barnes?

Mr. Grimes: Substantially the same as Miss Barnes.

Mr. Rollins: I do not know about the experience of the rest of them. I understand some of them are just students.

Mr. Grimes: Their testimony would be—

Mr. Rollins: I do not know whether it would be as clear as this witness's testimony. I would want to have them around.

The Court: You cannot consent to that at this time?

Mr. Rollins: At this time.

The Court: We will call the students after lunch, so you can get some idea of the different classes of workers. We will recess. I think the qualifications of the interviewer would be in his mind before he consents to any pattern of taking testimony.

RECESS TO 2:05 P. M.

[fol. 309]

Afternoon Session

HILDA BARNES, resumed the stand in behalf of the defendant, and testified further as follows:

Direct examination.

By Mr. Barnes (Continuing):

Q. There was a 28th cluster, was there not, in the incorporated community group?

A. Yes.

Q. Would you state how that cluster came into being and was polled?

A. The 28th cluster came from the group of communities that had a population of under a thousand in the 1950 preliminary census.

Q. Were they added together?

A. Yes, they were.

Q. They became the 28th cluster of your group?

A. Yes.

Cross-examination.

By Mr. Rollins:

Q. All you did was merely count clusters, is that right?

A. No.

Q. You did not formulate any scientific plan on which this Hofstra poll was formulated?

A. No, I did not formulate the plan.

Q. This was all under the generalship of Professor Chappell?

A. No.

Q. I mean by that, supervision?

A. Yes, I guess under the general direction.

Q. He was the man formulated the plan, is that right? Or did you assist in formulating the plan?

A. No, I did not assist in formulating the plan.

Q. If I understand you correctly, you pasted aerial photographs on this map?

A. Yes, I pasted those particular ones.

[fol. 310] Q. What exhibit is that?

A. I.

Q. That did not take any particular scientific knowledge to do that, did it?

A. No.

Q. Did it take any specific scientific knowledge to count clusters?

A. No.

Q. You just merely did the problem of arithmetic, is that right?

A. Yes.

Q. How long did it take you to do your task?

A. In actual hours?

The Court: Yes, how long did it take you to do your task, whether it was spread over a long period or not.

Mr. Grimes: I am going to object to that until we know which task he referred to.

The Court: Her entire task in connection with this study.

By Mr. Rollins:

Q. Hofstra poll.

A. Say about 70 hours.

Q. That covered a period between what dates?

A. I don't remember the exact dates, I believe it was either the end of October or the beginning of November.

Q. Is that the time when you started or ended?

A. I don't remember what date I started on or ended on, but it was within that period.

Q. The year 1950?

A. That is right.

Q. Were you employed at any other occupation during that period?

A. Yes.

Q. This was something on your own time?

A. That is right.

Q. Did you get paid for it?

A. Yes, I did.

[fol. 311] Q. Who paid you for it?

A. Well, I don't mean directly. Mr. Simmons paid me.

Q. Who is Mr. Simmons?

A. Well, he is the person I worked with on the sample.

The Court: Do not we have the statement here that the defendant paid for this?

Mr. Rollins: That is what I want to find out.

The Court: That is in the record, undisputed.

Q. How much did you receive?

A. \$150.

Q. When you started on this project were you told the purpose for which your services were employed?

A. Yes.

Q. Were you told that your services were for the purpose of obtaining an opinion based upon evidence to be presented in this trial?

A. Yes, I believe I was.

Q. Are you a licensed private detective?

A. No.

Q. Were you ever employed by a licensed private detective?

A. No.

Q. Were you deputized by a licensed detective agency or private agency?

A. No.

Mr. Rollins: Section 71 of the General Business Law makes it a crime for any person to aid or abet the obtaining or gathering of evidence to be obtained in a civil trial action, and I maintain any evidence which has already been presented or gathered for that particular purpose violates the law, criminal statutes and the evidence is not admissible. [fol. 312] Mr. Grimes: I am going to ask—

The Court: Are you making a motion?

Mr. Grimes: This is said for the purpose of other witnesses. It is false. Secondly, even if it were true the evidence would be admissible. I move the remarks, if that is all they were of the Attorney General, be stricken from the record and I ask the Court to state to those witnesses or any other witness no crime was committed whatsoever.

Mr. Rollins: I move to strike out all the testimony of this witness upon the ground it appears affirmatively from the testimony she was paid and hired for the specific purpose of aiding, obtaining evidence to be presented in this trial, which is a civil litigation, and it appears affirmatively this witness was not an operative of a licensed detective agency, or employed by a licensed detective agency as required by Article 7, which consists of Section 70 et seq. of the General Business Law.

The Court: I am quite surprised to hear there is any such law. In every case I think there must be a great many violators.

Mr. Grimes: If there is such a law, I will have several motions to make. Might I ask whether Mr. Seaton is a licensed investigator on behalf of the State? Is he in court?

Mr. Rollins: Surely is.

Mr. Grimes: Of course, I know you won't.

The Court: Check there where that excluding language is. [fol. 313] Mr. Grimes: The only person in this whole case who even sounded like a private detective is the man who says he was formerly a special deputy superintendent of banks, now a bank examiner, who says he can conduct an investigation. That is the only evidence we have of a detec-

tive. Everything laid down is absolutely proper and it will continue to be so.

The Court: The Attorney General is misled by this language, without a doubt. That language is introduced by the general statement under the defining of the term, private detective business. It is introduced by the word including private detective business, shall include, then when you get down to various inclusions which are separated by a semicolon in this statute, location, lost property affiliation with reference to a person seeking employment, with reference to the conduct of the securing of evidence to be used before any authorized investigating department, Board of Award, Board of Arbitration, or in the trial of similar criminal cases. The language only means that a private detective business includes the activity of securing evidence to be submitted to a court. It does not indicate no other person can do the same thing. The motion is denied. Let us proceed.

Mr. Grimes: Thank you very much.

The Court: Counsel was cross examining.

Mr. Rollins: I also move to dismiss the testimony of this [fol. 314] witness upon the ground it is incompetent, irrelevant and immaterial, and not within the issues. May I take an exception to your Honor's ruling?

The Court: I will take your motion and I will say I will overrule the motion for you. Move again at the end of all the testimony to embrace every witness and every exhibit and every utterance. Any questions?

Mr. Rollins: No further questions.

WILLARD R. SIMMONS, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 515 Carroll Avenue, Mamaroneck, New York.

Q. Mr. Simmons, you heard the Judge's ruling upon the motion of the Attorney General, no crime has been com-

mitted in connection with the survey, so you do not have to be afraid.

A. Yes.

Q. What is your occupation?

A. I am a consultant in market research and sampling problems.

Q. Are you familiar in a general way with the Hofstra survey which is being introduced in evidence in this case?

A. Yes, I am.

Q. Did you count some dots?

A. Yes, I did.

Q. Can you count?

A. Yes.

Q. What is your professional occupation?

A. Statistician and sampling consultant, market research consultation.

[fol. 315] By the Court:

Q. What is that word?

A. Market research consultation.

By Mr. Grimes:

Q. Will you state very briefly what you have done in market research? First your education.

A. Well, B.A., University of Richmond, M.A., Duke University.

Q. What did you do after you received your M.A.? What sort of business did you go into?

A. I taught for several years, then I was hired—

Q. Where?

A. My early teaching was in high school in Virginia, after which I became statistician for the State Department of Welfare in Virginia, that was in 1940; I went with the Federal Government in 1941, worked there as a statistician in 1941 until 1947, when I took a position with Politz Research as head statistician, served there three years, after which I became a private consultant in sampling.

Q. Are you a mathematician?

A. Yes.

Q. Have you gone into higher mathematics?

A. Yes, I think I can say that.

Q. Did you count dots in connection with this survey?

A. Yes, I did.

Q. What area?

A. I counted the area on the map noted as area K, which was one of the areas of the unincorporated area of Nassau County.

Q. What other sub-division?

A. I also counted part of the unincorporated area in Oyster Bay Township, adjacent to the Village of Oyster Bay.

Q. I am not going to ask you any specific question with reference to this next matter, but you did other work? [fol. 316] Just answer this yes or no, in connection with this survey, is that correct?

A. Yes.

Mr. Grimes: I think I shall call this witness later on another subject, but I want to go into the dot subject at the present time.

Q. Have you mapped all the localities in which you personally counted dots?

A. No. The difficulty of giving particular designations, which have no special meaning to us than just identifying the area in the County and unincorporated area. It is segregated in one set of maps to be counted, so that we can divide the work up in appropriate divisions for each person to work on.

Q. Did you work with Miss Barnes in connection with that count?

A. Yes, I did.

Q. Also counted dots?

A. That is correct.

Q. As to the dots which you counted did you count them accurately so far as you know?

A. Yes, of course.

Cross-examination.

By Mr. Rollins:

Q. You are not a licensed detective, are you?

A. No.

Mr. Grimes: I object.

The Court: I sustain the objection. Immaterial.

Mr. Rollins: May I, for the purpose of the record? I offer to examine this person on the claim or contention advanced with reference to the testimony of Miss Barnes, and I submit that sincerely.

The Court: Put it on the record, but I consider it immaterial.

[fol. 317] By Mr. Rollins:

Q. All you did was just merely count dots, is that right?

A. No, that is not all I did. I counted dots.

Q. That does not require any great skill or special knowledge of higher mathematics to be able to count dots?

A. No.

Q. You worked exclusively under the control of Professor Chappell?

A. Under his over-all supervision, I would say.

Q. You were not his consultant, were you?

A. Yes.

Q. He consulted you?

A. Yes.

Q. Were you the specialist on this job, or was he?

Mr. Grimes: Objected to.

The Court: Allowed.

The Witness: I was a specialist.

Mr. Grimes: If he can answer yes or no.

The Witness: I was a specialist on the job.

Q. You were a collaborator, you claim to be a collaborator of Professor Chappell on this Hofstra poll?

A. Yes, with respect to sampling.

Q. As a matter of fact, this is not a Hofstra poll, is it? It was a poll for this litigation, Franklin Square Bank people?

A. As far I knew it was a Hofstra poll.

Q. Were you paid by Hofstra College?

A. As I remember my check was made out that way.

Q. Do you mean you believed you were making a poll for academic purposes of the College?

A. I did not inquire into the purpose.

Q. You did not know this was to be used in this litigation?

[fol. 318] A. No, I did not know it would be used in this litigation.

Q. Did you believe this work that you were doing was to serve a school of learning?

A. Indirectly, yes.

Q. What do you mean by that?

A. The school was doing the survey; they asked me to do the sample. I inquired no further. They asked me to work with Hofstra.

Q. You mean to tell me you never knew this survey was made to serve litigation purposes of the Franklin Square National Bank?

A. Yes, I can say yes to that.

Q. Do you know now it is being used for this particular purpose?

A. Yes.

Q. Is this the only time you ever found this out?

A. No.

Q. When did you find out before this date?

A. That I don't remember. It was sometime during the course of this sample for which I was called in as a consultant to work with Dr. Chappell in carrying on conversation with others what it was to be used for, I acquired knowledge it was being done for a client with which the bank was connected. I cannot say exactly when that knowledge came to me.

Q. Client of whom?

A. Client of those engage- in the survey, particularly Hofstra.

Q. You were employed by the College? Does the College have any clients?

A. I don't know.

Q. When was this knowledge that you acquired, your efforts were to be engaged in acquiring evidence to be presented in this litigation? Give me the exact month or period.

A. I have not the vaguest notion.

[fol. 319] The Court: He answered that. He said he did not know. It was sometime during the period the survey was being taken. He said that in his former answer.

Q. Would the month of September, October, refresh your recollection.

A. No, it certainly would not. In this case I had no particular interest in who the survey was being done for.

Q. How much were you paid for your efforts in this matter?

A. I was paid a fee which covered some other persons' activities, too. That fee was \$650.

Q. For this activity in this case and some other activity, too?

A. If you mean by this activity, counting dots, no.

Q. I am talking of all your efforts in relation to the so-called Hofstra poll.

A. Yes, for the Hofstra poll I was paid \$650 which half was to be used to defray other expenses than personal fee.

Q. That was in connection with this very same sort of Hofstra poll?

A. It was to be used in connection with the Hofstra poll, Hofstra survey exclusively.

Q. Did I understand you to say that the \$650 was paid by Hofstra College itself to you?

A. To the best of my understanding, yes.

Q. Is it possible you received a check from the defendant, Franklin National Bank or their counsel?

A. That I am sure I did not receive.

Q. Did you receive it from Professor Chappell?

A. Yes, I received it from Professor Chappell. I just don't recall how the check was made out, who made the check out, but I am dead sure it was not the bank.

[fol. 320] Q. Are you certain it was paid by the College, by check of the College?

A. I can only know the Doctor gave me a check.

The Court: He just answered he does not know who made the check out. He knows that Dr. Chappell handed it to him. That was his answer.

Mr. Rollins: I move to strike out the witness's testimony on the ground it is incompetent, irrelevant and immaterial. His testimony was in connection with an investigation to discover evidence to be presented in this litigation, and violative of Article 7 of the General Business Law.

The Court: That is as far as you need go, and that makes the record. I will deny the motion.

By Mr. Grimes:

Q. Will you state just what you did in connection with the survey, please?

The Court: This will be considered direct examination. Counsel is now availing himself of the reservation he made to call this witness to develop a broader point.

Mr. Grimes: Well, yes.

The Court: It could be both, but if it is to be re-direct, it would have to be very narrow. But this question asked now would hardly be proper, but suppose you take it on recalling the witness. Is that what you are doing now to develop this whole activity?

[fol. 321] Mr. Grimes: I would rather for the most part on direct, call him at a later date, but I would like to ask him in what capacity he did serve here.

The Court: You may develop what the service amounted on re-direct, because on cross examination he was asked what he got for it. You have a right to show his pay was commensurate with the work he did. Go ahead.

Q. Please state what you were employed to do, what you did do.

A. I was retained by Professor Chappell to work with him on designing a sample to be used, planning the procedure and the basis for selecting the areas which were to be visited by the interviewers, and to also write up, explain in detail, how that was done.

Q. Would you say you were engaged in a consulting capacity with Dr. Chappell?

A. Yes, I was engaged as a consultant.

Q. Is that field, sampling designs, something which you have engaged in for a number of years?

A. Yes. I have been working in sampling work for seven or eight years.

Mr. Grimes: That is all I want to ask now. I want to reserve the right to call this witness at a time I think would be more appropriate.

By Mr. Rollins:

Q. Your specialty you said was in the marketing field, is that right?

A. Currently, yes.

[fol. 322] Q. In the marketing field it is a matter of business activity to determine what we call in the trade, sales resistance to a given commodity by inquiring of people, calling?

A. I have never done such.

Q. You never made a poll to determine whether an article was desirable from the sales point of view?

A. (No answer.)

Q. You know what I mean, don't you?

A. Yes. Well, things that border on that.

Q. Let us assume for example, there is a cosmetics submitted to you in connection with your work to determine whether or not it could be sold at a profit, your service would be to ascertain that fact in the market field?

A. No, indirectly only in the sense I am called in for sample work primarily. If a survey may be used for other purposes it seldom concerned me.

Q. When you speak of polling, it is a matter of getting public opinion as to a commodity, whether it could be sold in the market, is that not what that would mean, marketing?

A. Not entirely by any means, market surveys are conducted for many reasons.

Q. In the generally accepted sense?

A. I do not consider that to be the sense.

Q. Would the sense I intend to question you on, that is, namely, to determine sales resistance of a commodity come within your field of endeavor or don't you understand what I mean?

A. I am not sure I do.

Q. Supposing a client gives you a certain product, say a cosmetic under a new formula and he wanted to find out whether it could be sold in the market, for you to obtain [fol. 323] public reaction, would he retain a service such as yours? Would it come within your field?

A. It would not come within my marketing field.

Q. But there are other persons engaged to determine that sales resistance?

A. I think so.

Q. Surveys made by testing public opinion on that?

A. Yes, I think they are.

Q. In relation to marketing as you say you are a specialist in, what would your field cover in determining the kind of reaction?

A. I have specialized in sample work as I said before.

Q. What, test?

A. No, sample poll.

Q. Public opinion, is that not right?

A. No, drawing samples in which we select persons, households, business firms or other units to be used as a basis for inferences regarding a larger group.

Q. Marketing means the sale and purchase of something, is that right?

A. Yes.

Q. And to obtain the public opinion in that field it is necessary to obtain the reaction of the public, is that right?

A. Not always an opinion, sometimes facts, sometimes objective questions are asked as to what they might have done or bought. That phase of it I am not engaged in.

Q. But to determine what?

A. I don't understand your question.

Q. Sales resistance or price, or marketing.

Mr. Grimes: I object to that; already asked and answered several times.

The Court: The witness answered he does not understand. Or, you did say, add something to the question. Maybe you better reframe the question for one he understands.

[fol. 324] Q. Your subject you say is the developing or ascertaining public opinion dealing with a subject called marketing?

A. No, I did not say that.

Mr. Grimes: That is contrary to all the testimony he has given.

Q. Did you not say something about marketing before?

A. Yes, I said something about marketing before.

Q. What did you say about marketing?

A. I said I was a consultant in sampling problems in marketing research.

Q. Sampling what?

A. Sampling people, households, business firms, service stations, retail outlets.

Q. To obtain an opinion, is that not right?

A. I did sampling to obtain an opinion? No.

The Court: Have you completed your answer? Have you finished?

The Witness: Yes.

Q. Your object in sampling is to ascertain a different point of view, if any there exists by comparison?

A. No, that is not my objective.

Mr. Grimes: That is not comprehensible as a question.

The Court: Allowed.

Q. What do you intend to ascertain in relation to that marketing subject you talked about, by making a sample poll?

A. Maybe I can clear this by simply saying I am retained usually to select samples, other people use samples for visits [fol. 325] and obtain opinions. That is not part of my province.

Q. You mean set up machinery to obtain this opinion from the public?

A. I mean selecting the individuals who are to be included from the population in the survey, the people to be visited by the interviewers if you like.

Q. You mean you are setting up groups to obtain stratified opinion?

A. Yes.

Q. In other words, you are setting up a specialized group to get a cross section of opinion?

A. Yes, that is it.

Q. That is the only way you can get a stratified opinion, isn't that right?

A. What is the only way? I am not sure that this—to get a really stratified opinion or report?

The Court: I would like to hear the question.

By Mr. Rollins:

Q. You understand what I mean by a stratified opinion. Before I finish do not express an opinion before I finish. It is essential you get a cross section of opinion, isn't that right?

A. Of opinion?

Q. That is right, cross section of people, let us take it that way.

A. Yes.

Q. So in order to determine test preference you would have to get professional people, you would have to get laboring class, white collar group and the like, would you not, before you could determine the opinion poll of a stratified basis. Is that not right?

Mr. Grimes: I object to this as irrelevant, because there is no opinion poll here.

[fol. 326] The Court: I think counsel has the right to question the competence of the witnesses.

Q. So in order to determine, test the preference, you would have to get professional people, you would have to get the laboring class, white collar group and the like, would you not, before you can determine the opinion poll on a stratified basis? Is that not right?

A. The question is a little technical in this sense.

Q. It surely is.

The Court: Answer first, yes or no, or you cannot answer.

The Witness: I do not think that is susceptible to yes or no answer.

By Mr. Rollins:

Q. Give me your best answer.

The Court: Give your best judgment to that question if you can.

The Witness: If one were to set out to discover taste or any quality possessed by the population, in taking a sample to do so he may or may not stratify, and if he does stratify the population he need not use such characteristics as you mention, referring to occupation, profession, labor—that

need not go in it. One can still take a sample without recognizing those groups as such, without even knowing how many people of each such group is in the population. There are many ways in which a sample operation might be conducted.

[fol. 327] Q. If it is not done that way then it is a poll by random, is it not?

A. No, not necessarily.

Q. You mean to tell me if you just go ahead and pick out a house in a certain district, a certain street, without finding out who lives there, what their earning capacity may be, you could determine whether or not the person is desirable, or desirous of opening up any special bank account, is that right?

A. No, I don't mean to tell you that.

Q. In making your survey here, did you know whether or not the plan set up here in which you say you collaborated, whether persons who were questioned by the interviewers worked for a living or had any income?

A. No. I knew nothing about the people individually. I know that by the method of selection used we must necessarily get into the sample various occupations in the approximate proportion as they exist in the population because the probability theory underlying the thing is such that that must inevitably occur.

Q. In other words, you, a professor, did not think it necessary in order to establish knowledge on the part of the public as to all types of bank accounts whether or not the peoples interviewed had money to deposit?

A. No, we did not consider that necessary; no, it was not necessary.

The Court: In formulating the survey?

Q. In formulating the survey, is that right?

A. That is right.

Q. In other words, whether a fellow who never worked for a living, was a hobo, or was supported by a rich relative, that formed no matter in your calculation?

A. Not one whit.

[fol. 328] Q. All you were interested in was finding out

whether people, whether they knew the terms set forth in Exhibit D-G?

A. Is that a question?

Q. Yes. Those are the questionnaires.

A. I had nothing to do with questionnaires.

Q. But you were a consultant, as a specialist?

A. On a sampling problem, may I remind you.

Q. You are not accepting responsibility for the poll?

A. No, I am telling you I am accepting responsibility for the sample for this particular college I was concerned with.

Q. Did you not?

A. Yes, I saw a copy of the report.

Q. Did you disapprove of it?

A. No, I certainly did not. On the contrary, I approved of it.

Q. That was after examining the entire survey?

A. Yes.

Q. Am I correct in stating that 928 people were interviewed in the entire survey?

A. It was approximately that, certainly.

Q. Do you know if there was any one individual of that 928 people that had a job?

A. I don't know of such an individual, but I am dead sure there were some.

Q. Is that your opinion or a guess?

A. I am sure there were some.

Q. Based on what factor would you say it was dead sure they had jobs?

A. Because of the fact that the sample used in this survey could not possibly have contained 928 people without having at least some who were employed, and it would be an extremely remote possibility it would not exist in the sample in the same proportion as the population.

Q. You say there are not 928 out of 666,000 people in [fol. 329] Nassau County who do not work for a living?

A. No, I did not say that.

Q. Your statement about there must have been some had a job; could you point out the name of one of your survey had a job?

A. I don't know the name of any one in the survey.

Q. Would your records in the survey indicate any?

A. I believe the interviewers will indicate that.

Q. You mean on reports made?

A. I don't know.

Q. Did you see any reports made about job earnings of families interviewed?

A. No.

Q. That is what you call a stratification in that case, is that right?

A. No.

Q. What kind of an investigation would you say you made?

A. (No answer.)

Q. I mean stratified poll, let us call it that way, as you call it.

Mr. Grimes: He did not call it that way.

Q. Do you call this poll testified to by Professor Chappell a stratified poll?

A. I did not.

Q. What do you call it?

A. The probability sample of people in Nassau County over twenty-one years of age.

Q. It is not a stratified poll, is it?

A. Stratified?

Q. Yes or no. Let us not quibble.

A. I cannot answer that yes or no.

Q. Is it a random poll?

A. I cannot answer that directly. That cannot be answered directly.

Q. What kind of poll is it?

A. Probability sample.

[fol. 330] Q. What is the margin of error?

A. The approximate margin of error on this poll will turn out to be, it will be a different, of course, error margin for every characteristic, every estimate in the report, therefore one cannot say the error margin is specifically this without referring to the particular estimate that is contained in the paper.

Q. You say there was a cross section, I believe you said that concerning this so-called poll that you laid out?

Mr. Grimes: There is no such testimony.

The Court: He is being asked if he did say it.

Mr. Grimes: That is not as I understood the question. That is what he said there was not. We have a question assuming a state of facts contrary to what the witness said and I object on that ground.

The Court: The subject is not an ordinary one.

Mr. Grimes: That is true.

The Court: The attorney is thrown into this without preparation, and the study that may have been afforded to your side of the case, and the Court must make very generous allowances for his development of the point which he is called upon to make while he is standing on his feet as witnesses come one after another, and it is with that in mind that I make the rulings which I make.

Mr. Grimes: I understand, and I have the greatest sympathy, and no object to surprise, but at this point he does [fol. 331] say he has knowledge of polls greater than mine. I just do press the objection, assuming a state of facts contrary to the evidence as though the evidence had been stated that way, and that is the only basis of my objection. I do not object captiously. I am quite liberal in that but—

The Court: The differentiation of these witnesses with that activity are minute and the slightest transposing of expressions they imply makes a big difference to them, so the Court is allowing the Attorney General wide latitude in the conduct of this cross examination, so proceed.

Q. You did take a cross section, did you, of Nassau County as to pursuit, that is vocation and profession, did you?

A. No, I did not.

Q. The only cross section you took was, and which could be in contrast are those in incorporated communities and those in unincorporated communities, am I correct in making that statement?

A. No, I don't think the only cross section.

Q. Tell me what other cross section you took.

A. As probably has been covered before a sample was laid out, the sample in which we developed 60 clusters.

The Court: You asked him in what way was any cross section developed, to state it. You state that in your own language.

The Witness: The cross section idea, I presume you mean [fol. 332] by stratified, which existed in this survey, was stratified for the selection of blocks, not for the selection of individuals within blocks. In stratifying the blocks we made sure by our method of selection that they came in proper proportion in large towns, medium sized towns and small towns which was brought out in the evidence regarding the array of towns from large to small. In addition there was geographic strata assured first by selecting both the clusters which fall in towns as well as those in open country from each of the three townships in proportion to the population and within the sampling, within each of the three townships for the unincorporated area, the numbering of the blocks assigning them to block cities Miss Barnes described in her testimony was such as to assure us the blocks would fall roughly over the entire geographic spread of the count, and the stratification was confined to that strip in the selection which concerned itself with selecting of blocks, having selected blocks, selection of individuals became a matter of probability but there was no further cross section if that is what you mean by that involved.

Q. Having used the word stratified so many times, would you say this poll as you term the Hofstra poll to be a stratified poll?

A. Stratified poll? I don't understand.

Q. I ask, yes or no? You are an expert on polls.

A. Yes.

[fol. 333] **By the Court:**

Q. Was it? Yes or no, if you can answer.

A. I cannot answer that yes or no.

By Mr. Rollins:

Q. Was it a poll at random?

A. That cannot be answered yes or no.

Q. There are only two kinds of polls, a stratified poll and a random poll.

A. When you say poll, you mean sample?

Q. Yes, sample.

A. There are many different types of samples. They by no means exhaust the field.

Q. You mean there are many more——

The Court: When you say poll, he does not join in the terminology.

Q. You have heard the term, poll?

A. Yes, I have.

Q. The title of this very project is called the Hofstra poll?

A. Not to my knowledge.

Q. What is it called? May I have Exhibit G?

The Court: Do you know what it is called?

The Witness: I have heard it referred to as the Hofstra study, Hofstra survey.

By Mr. Rollins:

Q. Are there more than two classifications, namely random sample poll or stratified sample poll?

A. Indeed there are. There are many more.

[fol. 334] Q. Give me the others.

A. They are cluster sample, cluster samples, there are stratified random samples, there are also multiple stage, single stage and sample stage operation; there are variations of—called systematic samples, and there are combinations of these things I have given before such as stratified cluster sample with random selection within the clusters, so on.

Q. You mean these are all titles of the subject you are trying to convey to me, or sub-titles?

Mr. Grimes: I object to that.

The Court: They are in answer to your question. Name what other kinds of samples there are besides random and stratified.

Mr. Grimes: Have you finished the answer?

The Witness: Yes.

Q. Am I correct in stating that in taking a random poll, you stand on the corner of 42nd Street and Broadway and ask anybody comes along what his opinion is or preferences are on a particular subject; is that what you call random?

A. No, that is not what I would call a random poll at all.

Q. What would you call that?

A. I would call that a quota sample or at least, let me put it this way: it does not begin to meet the requirements of a random sample in any sense.

Q. Did you do anything different in such a poll by picking them out from the sky?

A. I did not pick any from the sky.

Q. There was a picture taken, aerial picture?

A. Yes.

[fol. 335] Q. You did not know who lived there, did you?

A. No.

Q. You just by making these clusters, you picked it from buildings, you just picked buildings, did you not?

A. No, I did not pick buildings.

Q. Somebody in your company did.

A. No. We picked areas of land.

Q. On that land you picked also structures that you were counting?

A. No, not from the photograph.

Q. You mean you did not start off with a photograph and pick off any clusters?

A. We picked clusters, areas of land, they were picked with probability assigned to them in proportion to the kind of dwelling units or estimates of dwelling units based on photographic count. Finally, got one of these areas in the sample, then I think it must have been covered or they were pre-listed by having an interviewer visit the cluster and list every dwelling unit in that cluster, adhering to the boundaries as designed from the aerial photograph.

Q. A person's knowledge of any particular subject is governed by experience or education, isn't that right?

A. Yes.

Q. Do you know of any other method?

A. Not off hand.

Q. When your pollsters went to make interviews were they told to find out the experience or education of those interviewed?

A. Can I testify as to what instructions were to interviewers?

Q. Do you know whether or not any of those question-

naires given these interviewers contained any such questions?

A. No, I don't even remember that point.

[fol. 336] Q. Would you say there were none?

A. Cannot say, I don't know.

Q. Yet you were to consult them on this enterprise.

A. On this sample.

Q. You did not think that was necessary at all?

A. Not for doing a sample, no, indeed.

Q. Could you tell merely by picking a structure or dwelling the education, what the experience of its occupants?

A. No.

Q. Is it not a matter of common knowledge that a person, any person who opens a bank account are only those who have money to do so?

A. Naturally.

Q. You did not think it was necessary to interview as to what the income was or as to any surplus left over?

A. No, I did not think it necessary at all.

Q. That was not necessary to determine whether or not you were questioning persons who were likely to have such?

A. Was it not necessary? Is that your question?

Q. You did not think it necessary?

A. No, I did not think it necessary.

Q. In asking a person's faith by a sample poll or taste if you like, champagne, you would not go to a beer drinker?

A. No, I would not.

Q. You would go to people who have a taste for champagne, would you not?

A. Yes.

Q. You testified that you did not, in constructing the sample, take into consideration the economic strata if any, in which the people lived, is that correct?

A. That is correct.

Q. Did you have a purpose in mind in making that sample without any such economic strata?

A. Yes, I did.

[fol. 337] By Mr. Grimes:

Q. Will you state fully what that purpose was, and what advantages or disadvantages that method of eliminating economics had?

A. To begin with, we decided this should be a probability sample, which meant we must be able to state the probability which each individual in the county had of coming into the sample. Having once set our plan to draw a probability sample, then setting up a procedure which we have heard described for achieving that, it not only became unnecessary but extremely difficult demonstratively to even handle a matter such as distinguishing between rich and poor, for that is at best a subjective estimate and you cannot tell as these things fall in the sample which we use which would turn up in any given spot. We felt certain in the sense that anyone does in flipping coins or using any other random process that by taking 928 such households with known probability under the design described they must turn out to be so many rich, so many poor and the approximate proportion in population just as any other case as drawing chips from a bowl.

Q. In other words, the question of economic stratification was taken care of automatically by the random type?

A. Yes, indeed so, as if you draw cards from a deck. It was not subjective in other words, it did not depend on someone's opinion as to the economic level at which any family may live as it did from appearance or anything else, it only depends on random laws of probability, or random chance.

Q. As I understand your testimony you say when you do take a stratified type of poll where the stratification is [fol. 338] economic, that involves somebody's opinion or judgment?

A. It is almost inevitable that has to get into it. I do not see how you can do it otherwise. I do not see how it could be achieved without bias which might be serious in a thing of this sort.

Q. And the type of sample you designed here is one which eliminated that possible bias?

A. Yes, it did.

Q. Was unbiased?

A. Means these things have to come out in approximate proportion.

Q. You were asked about the instructions given to inter-

viewers. Will you please state what those were in connection with the sample?

A. In connection with the sample the plan called for interviewers—well, first the interviewers pre-listed the block which meant that having the boundaries of the cluster block or cluster which may have been more than one or more blocks described the cluster following the boundaries of the area lying within those boundaries the interviewers pre-listed or were instructed to do so all dwelling units.

Q. We have had testimony on that?

A. Yes.

Q. My question related to the instructions to interviewers in relation to the subject matter which the Attorney General inquired about and I am simply asking you about the instructions to interviewers you gave.

A. I thought this question related to instructions concerning the interview which I did not participate in, therefore, I could not answer.

Q. How would you describe the Hofstra survey? What type survey was that?

A. It was a probability sample. That would be a designation which has grown to distinguish it from samples of the [fol. 339] sort which I understood the Attorney General to refer to, in which they use a more purposeful selection or subjective choice of the respondents to conform to the interviewer's idea.

Q. That is an economic stratification type?

A. Economic stratification type, or so many old, so many young, so many rich and so many poor, that type of thing is usually done in what is known as a quota sample in market research.

Q. Which type of sample in your opinion is more accurate, the quota sample opinion or probability type of sample, as applied to a problem such as ascertaining the knowledge or lack of knowledge of certain terms of people in a particular community such as a county like Nassau County? Which in your opinion is the more accurate type of survey?

A. I feel quite strongly the probability sample is more accurate, much more so.

Q. Than the quota type?

A. Yes.

Q. Can you state the reason, briefly?

A. Yes, I think so.

Q. Please do so.

A. Quota samples inevitably possess bias. One bias arises out of the fact that interviewers exercise judgment in the selection of households, and they may be motivated by thoughts of convenience or they would like to talk to this type of person or the other, things which are not rigidly controlled. In this operation none of that was left to anyone's subjective judgment at any point on the way. The designation of respondents from beginning to end was all done on an automatic process involving random numbers which completely took away any subjective element which can be the cause of bias.

Q. Go ahead. Are there other?

A. Yes.

[fol. 340] The Court: I think that is a complete answer to that question, is it not?

The Witness: There is at least one other.

Q. You said the probability sample eliminated the subjective?

A. Judgment.

Q. Possibility of error in judgment?

A. Yes.

Q. You must decide in advance what economic stratification you go for, is that correct?

A. Yes, and the interviewer's designation of those respondents.

The Court: We have that point. You gave that to us first. You said that the quota allowed the interviewer to select. This other method permits no selection.

The Witness: The other method is completely objective, and is therefore analogous to the type of poll selection which is well shuffled when you select. One objection to the quota method as I see it lies in the fact, one other objection, lies in the fact that to assign quotas to interviewers for example, so many rich, so many poor, you must know in advance how many rich and how many poor there are in your population and if you did not have that knowledge accurately quotas you assign would show in wrong proportion.

By the Court:

Q. So that you could set up a ratio?

A. Yes.

The Court: I think we understand that.

[fol. 341] By Mr. Rollins:

Q. There is an error margin in the method used by you?

A. Yes.

Q. What is the percentage? That is what I want to find out.

The Court: He says you could not give an over-all percentage unless you asked for it in a special division.

Mr. Rollins: Throughout all of Nassau County.

The Court: You would have to ask for it in a special activity.

The Witness: Yes, each estimate in the report has a special margin of error. It will not be the same for any two estimates in the survey.

By the Court:

Q. Did you not say you could not give any over-all margin of error?

A. Yes.

By Mr. Rollins:

Q. Give me the Glen Cove. What is the margin of error on Glen Cove?

The Court: No. You do not understand, unless I do not understand it. He cannot give an over-all margin of error. You would have to ask him what his margin of error on the setting up of clusters or of setting up of various dwellings. I want to ask him if that is correct.

[fol. 342] The Witness: No. I mean for every estimate, separate estimate in the report, for example if you ask this question there will be a margin of error attached to it. If you discover in your survey so many of your responses have this characteristic and so many the other characteristics, each of these would have a separate error margin, it would

not be the same for two different characteristics. That we measure by the survey. You see, if you had asked only one thing.

Q. The maximum possible aggregate error?

Mr. Grimes: I object to this question as meaningless.

The Court: I do not understand that last answer. I understood you to say, No. 1, let me see if we have this right, that you did not feel in a position to give a margin of over-all error on this survey, is that correct?

The Witness: Yes. I even state that is impossible.

By the Court:

Q. I want to ask you this. Can you approximate the over-all margin of error on this survey?

A. I think it might clarify the whole matter if we say each estimate has an error margin.

By Mr. Grimes:

Q. When you say estimate——

[fol. 343] By the Court:

Q. That is a new term we have here now, the word, estimate.

A. In other words, estimate has a margin of error. The sample does not.

Q. Mr. Grimes says what do you mean by the word, estimate, there?

A. If, for example you ask how many of the people were employed, I don't know whether that question is there or not, you will say so many say yes, so many say no, then they are estimating the noes in that case, taking the same estimate, but then you may also ask, how many.

Q. You can stop there. Then what I understand you to mean, and perhaps it is understood in this assumption, if you call it that, that the margin of error is not in the formulation of the plan, but it is in the answers to the interviewers, if there is a margin of error? That is where you would find it, is that right?

A. No, I would not say that. The error margin for any characteristic you set out to measure will depend on your sample design.

Q. Will you keep this in mind. We know what the characteristics of yours is.

A. But there is more than one, and each has a separate error margin, therefore I cannot give an over-all answer.

Q. The margin of error which you have in mind is one that turns up when you finally get the answer or answers.

A. Yes, to any particular question.

Q. Yes, to a particular question, but it is not before those answers come in? That is where you get the word, estimate, [fol. 344] into your testimony, is it not?

A. Yes.

Q. I want to eliminate a misunderstanding I have. I think it has been done, but I am not sure of it. When counsel was questioning you about margin of error, and you were making answers to the effect that there is such a thing as a margin of error in this development, you referred to certain estimates?

A. Yes.

Q. And you were not then referring, were you, to the divisions of the plan, of the survey in its original setup?

A. Oh, no, no. I am referring to any particular characteristic we find by asking respondents questions.

The Court: The margin of error in his judgment generates from the answers to the questions.

By Mr. Rollins:

Q. When you say estimates, what do you mean in terminology of surveys, statistical surveys?

A. Well, for example, if you had asked everyone how much income he earned, on the basis of this sample we get an estimate of average income. That would be an estimate. If you asked them how many have a bank account then we can estimate from the sample. That would be another estimate and for each such estimate a survey turned up the margin will be different, it will not be the same for each margin that comes up.

Q. If you ascertained approximately 85, 90 percent, of the people, this is hypothetical at this stage due to the meaning of the word, savings, and only ten percent knew [fol. 345] what thrift account was, would there be a margin of error for 90 percent or ten percent?

A. Yes. In that case there would be a different margin of error for the two.

Q. In other words, margin of error is to some extent a function of statistical percentage?

A. To some extent, yes.

By Mr. Rollins:

Q. The subject of sample deals with the over-all subject called statistics.

A. Yes.

Q. It is not a subject of psychology, is it?

A. No.

Q. Statistics as applied to samples is not called an exact science? Is not that one of the principal statements made in the subject by authority?

A. There I think I would have to distinguish sample as a science as applied to anything.

Q. Exact science. You mean what you discovered was exact science, results obtained by you in this particular poll is exact?

Mr. Grimes: I object. A matter of judicial knowledge, there is no such thing as an exact science.

The Court: I allow it. This goes to the authenticity of the survey.

The Witness: The question as I heard it, what I discovered was an exact science? No, but we practice there science and the word, exact, is subject to objection we make about science, the result obtained is not exact and perfect, could not be, no.

[fol. 346] Q. What is the margin of error as to the results obtained, if it is possible of mathematical calculation?

A. Yes, it is.

Q. I would like to know how much.

A. It is possible of mathematical calculation, but it will be different for each estimate. How can I answer?

Q. Did you make a calculation in this survey?

A. Yes, I can.

Q. What was the mathematical calculation?

A. You said did I make one. Beg pardon. I thought you said, could I. No, I have not.

Q. Would it take you long to make that determination?

A. For a particular estimate, I don't think it would take an awful long time.

Q. Have you any approximate idea? Would it be approximately 25 percent? I am talking about your results, your answers.

A. Which result; which answers?

Q. I am interested in your opinion.

The Court: This witness said he could only give a margin of error if you give him a particular estimate. If you are talking about an over-all he cannot give.

By the Court:

Q. Can you give a margin of error on any estimate in this study and select your own estimate?

A. Yes, I am prepared to say that the error — margin may be computed for any estimate in this report. I have not yet computed any.

By Mr. Rollins:

Q. After that computation could an opinion be expressed?

A. Yes, an opinion could be expressed, of course.

[fol. 347] Q. Would an opinion based on that be accurate?

A. Yes, it would be fairly accurate.

Q. When you say fairly you mean there would be, that would take into account the margin of error we are talking about?

A. Yes.

Q. Since you said it would be fairly accurate, could you give us an approximate percentage of error?

A. On any estimate I would give one.

Q. Please take any part of that 928 sample ballots as is said to have been taken in this particular survey and show us hypothetically what margin of error could be obtained in this particular poll.

The Court: Take whatever estimate you want to answer that question.

The Witness: I have no estimate in front of me. I do not know it exists. How can I answer such a question?

By Mr. Rollins :

Q. The Gallup poll, you are acquainted with that?

A. Yes.

Q. Fairly accurate poll? Professor Gallup? It is a nationally known poll?

A. Yes, I know of it.

Q. Enjoyed an excellent reputation?

A. Some places, some people.

Q. In your opinion, it is not good, is that right?

A. It is not comparable to this job in any sense.

Q. You believe it is better?

A. I believe it is worse.

Q. The only reason on which you predicate your statement is in the last Presidential election it guessed wrong?

A. No. I said that long before election, on which I won money betting against it.

[fol. 348] Q. A newspaper called the News?

A. Daily News, New York.

Q. Don't they enjoy a reputation as pollsters?

The Court: This is important to you that this poll is accurate, because if the Court uses it, its accuracy becomes of the greatest importance, but I want you to restrict your examination, if you can.

Q. Do you know what is meant by a special interest account, compound interest account and thrift account?

A. Vaguely.

Q. Did you study economics?

A. Yes.

Q. Was banking a subject of economics?

A. Yes, money and banking.

Q. Was not one of the subjects you were taught about, the difference between commercial bank and savings bank in your subject?

A. I knew there were two kinds, yes.

Q. You heard the terms, time deposit, demand deposits, in your study?

A. As I remember, yes.

Q. A time deposit bears interest in the nature of a savings account?

A. I suppose so, yes.

Q. High schools of the City of New York, elsewhere in the State, economics is in their curricula?

A. Usually it is not a high school subject.

Q. You mean economics is not taught in high school?

A. Not most places.

Q. Taught in New York high schools?

A. No, not where I went to high school.

Q. Do you know of anywhere it had been taught?

A. Yes, I know of one.

Q. You do not intend to convey the result you obtained in Nassau County, it is fair to tell us the same condition [fol. 349] exists in the rest of the State, the other 61 counties?

A. No.

Q. Your survey only reflects Nassau County?

A. That is true, it reflects Nassau County.

HOPE BUTT, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 10 Meristone Terrace, Bronxville, New York.

Q. You are married, are you?

A. Yes, I am.

Q. You have children?

A. Yes, I do.

Q. You work for the Psychological Corporation?

A. Yes, I do.

Q. Where is that located?

A. 522 Fifth Avenue, New York City.

Q. What sort of work do you do?

A. I do various types of interviewing for them, surveys, copy tests and advertising tests, a beverage.

Q. How long have you been doing that type work?

A. Around four or five months.

Q. Did you participate in the Hofstra survey of certain banking terms, knowledge of banking terms?

A. Yes, I did.

Q. In what capacity?

A. As an interviewer.

Q. I believed you served in some other capacities, too?

A. Yes.

Q. We will confine our questions to interviews. Prior to working on the Hofstra, how many other surveys had you worked on before?

A. I do not exactly remember, I imagine probably 15 or 20 for the Psychological Corporation.

[fol. 350] Q. In connection with your work on the Hofstra survey did you receive instructions to do something?

A. Yes, I did.

Q. Whom did you receive those from?

A. Dr. Chappell.

Q. What were your instructions?

A. They were to follow instructions exactly, that I must only take a person designated on that line, that if I took anyone else, if for instance, I took a man instead of a woman I would ruin the whole survey, he was very specific about I must follow them absolutely, and I did three pre-tests for him before, or pre-interviews I believe you call them, before I went out to survey, and there were more, too, but those were the most exacting and I brought them back and Dr. Chappell went over them.

Q. I show you about a pound of documents and ask you to look them over and then state what those are, state what the documents are.

A. They are interviews completed by me for the Psychological workshop of Hofstra College.

By the Court:

Q. Your notes?

A. Those are my handwriting, my signature.

By Mr. Grimes:

Q. Does that contain two types of documents in large number, first instruction sheet, secondly, notes of interviews?

A. Yes, it does.

Q. Would you look through and state whether those are all in your handwriting?

A. Yes, those are mine.
 [fol. 351] Q. What instructions did you receive from Dr. Chappell prior to making the interviews?

The Court: Except as you have already said. Anything further?

The Witness: Well, we must take of course, exact houses, we must ask questions just as they were worded, we must say nothing to the respondent at all except to take down what he said to us.

Q. In other words, you were to ask questions just as they appeared in these documents?

A. To be very careful to read them just as they were, yes.

By the Court:

Q. What record were you to make?

A. Record just exactly what they said and put it down verbatim.

By Mr. Grines:

Q. The instructions given you were clear, were they?

A. They were very clear.

Q. Did you make accurate notes of what people answered to the questions given?

A. Yes, I did.

Q. Wrote them down?

A. Yes.

Q. These appear in your own handwriting?

A. Yes.

Q. You followed instructions as they appear here, asked questions as they appear?

A. Yes, I did.

Q. Can you remember yourself, every answer given by every person you interviewed, every question?

[fol. 352] A. No, I cannot. In fact I was just as confused—no, I cannot remember.

Q. You notice these questions deal with four terms used in banking, is that correct?

A. Yes, I do.

Q. As of the time you took an interview and up to the completion of handing in to Hofstra College the last of

these questionnaire sheets, did you then know at that time what a savings account was?

A. No.

Q. Did you have some idea what a savings account was?

A. Yes, I knew what a savings account was.

Q. As of that time did you know what a thrift account was?

A. No, I did not. I am a banker's daughter. My mother did not either. I asked her.

Q. You will have to leave your mother out.

A. All right.

Q. As of that time did you know what a compound interest account was?

A. I had one, but I did not know what it was.

The Court: Does it matter what she knew personally?

The Witness: I really did not know what it was.

Q. Did you know what a special interest account was?

A. No, I did not.

Q. You said you were a banker's daughter?

A. Yes. My father was a banker.

Q. What position did he occupy?

A. He was senior vice-president.

[fol. 353] The Court: I am going to exclude that, because I do not want to open the door to cross about that.

Mr. Grimes: I offer these questionnaires in evidence.

Mr. Rollins: We come to the crux of this particular case. I object to the statements therein recorded on the ground they are hearsay in violation of the hearsay rule.

The Court: I will overrule the objection. Do you have some compilation of that batch of papers that you could provide Mr. Rollins with so that—

Mr. Rollins: I am not going to question, I am going to stipulate to shorten this trial. The State feels this evidence is incompetent on the ground of the hearsay rule, and to shorten the length of this trial because we feel it has no relevancy. It does not serve as expert testimony, no good but to delay this trial unduly without necessity. I am willing to stipulate to curtail this trial that the balance of

The Court: Why do we not do it this way? Your position

is very constructive. How many more witnesses of this nature did you have in mind calling?

Mr. Grimes: There are 43 others and 43 other batches of documents like that which comprise all of the answers to all the questions asked.

The Court: Do you say, with your knowledge and study of this case their testimony would be substantially the same [fol. 354] as Mrs. Butts'?

Mr. Grimes: I do, sir.

The Court: And the exhibits which you have just offered in evidence, would they be, would they have been developed in substantially the same way Mrs. Butts developed those?

Mr. Grimes: Yes, I would, exactly the same way except different persons were asked by exactly the same method.

The Court: I think on that premise—

Mr. Rollins: I would also like to have a stipulation that this witness and other persons whose testimony we stipulated with the reservation I just made, subject to my objection to its competency, are not employed or licensed as private detectives.

Mr. Grimes: Oh, yes, yes, indeed.

Mr. Rollins: That each of them received payment for their services in gathering—

Mr. Grimes: Yes. This was a professional job.

The Court: They were paid and the money was provided by the defendant. What source it went through—

Mr. Grimes: I believe he testified they were paid by Hofstra.

The Court: We will not go into that. The evidence here is undisputed the defendant provided the money for which the mechanics of putting it in the hands of workers is quite unimportant. Any other stipulation? Will you stipulate these other 23 would testify substantially in the same way [fol. 355] that Mrs. Butts has testified, that the documents which she developed would be substantially the same as these others except for the people interviewed and the answers made, not admitting the correctness of the testimony, accuracy of the recordings, or the truth of the testimony, likewise reserving your right to object to the materiality and relevancy as well as the competency of these exhibits and testimony?

Mr. Rollins: Except the testimony of the banker's daughter.

r, they did not know what special interest account and compound interest and thrift account meant.

The Court: We will except that. Other witnesses have given that testimony naturally.

Mr. Grimes: It would be substantially the same, yes.

The Court: Counsel is devoting his attention to the fact his lady is the daughter of a banker.

Mr. Grimes: I don't believe—there are no other bankers' daughters. But they will testify up to that time, most will testify they knew what the word savings meant.

The Court: Just as she did with respect to those terms.

Mr. Grimes: Yes.

The Court: Have you any objection to that being included in this stipulation? You heard her testimony with respect to the terms about which the interviewers were conducted?

[fol. 356] Mr. Rollins: I stipulate they did not know.

The Court: Their answers would be substantially the same as hers.

Mr. Rollins: Dealing only with the matter of gathering the poll, but not about savings.

The Court: Mr. Rollins does not want to stipulate what these people's personal experience might have been. I think that ought to be eliminated myself.

Mr. Grimes: 24 are from New York City like Mrs. Butts, two from Queens and 18 from Nassau County. I had intended to develop that line of questioning especially from those who live in Nassau County.

The Court: Under objection I exclude their personal experience. I am taking this on the general heading of the survey because I cannot take personal experiences because that would open the door to the Attorney General to call numerous witnesses to give their personal understanding of the meaning of those terms, and I do not want to get into that, so, Mr. Rollins, the Court will accept your stipulation with that eliminated.

Mr. Grimes: I would like to ask a few more questions.

By Mr. Grimes:

Q. Did you influence, or attempt to influence in any way, manner, answers given by persons you questioned?

A. No, I did not. I might say I have had training in interviewing.

[fol. 357] The Court: No. Just leave it that way.

The Witness: No, I did not.

Q. At the time you asked these questions did you know the purpose to which the answers to these questions were to be put?

A. I did not until the very end of the survey when one man I was interviewing said he understood——

The Court: One moment. To the very end of the survey?

The Witness: Yes.

Q. Have you handed in all but one?

A. Either my last or next to last cluster that I did.

Coloquy between Court and Counsel

Mr. Grimes: We will enter into a stipulation.

The Court: The stipulation is for your benefit.

Mr. Rollins: I am not accepting the last part of the statement. That I could not stipulate.

The Court: I do not think that is important, but I want to eliminate that question of personal experience, so it will not bother us in this case. If you will move to strike out the answers made by this lady to her personal understanding of the meaning of those terms, I will grant the motion.

Mr. Rollins: I will move the statement made by the witness concerning her personal experience, knowledge, as to the three terms, special interest, compound interest account, and thrift account be stricken from the record.

[fol. 358] The Court: I think it is a safe thing to do, to strike that out, because if I let that stand the Attorney General must be allowed to call witnesses here to testify as to what they understand those terms to mean.

Mr. Grimes: I would like to note my exception.

The Court: I am granting your motion, and exception. We have your stipulation with the testimony as emasculated, as it is now.

Mr. Rollins: Yes. Also that this stipulation covers 928 samples testified to by——

The Court: Yes, covers every interview made.

Mr. Rollins: I do not stipulate there were 928 samples.

The Court: No, you do not stipulate as to the accuracy of anything, just the others will say that. It would be in order for you to put in evidence other interviews.

Mr. Grimes: Yes. We would like them marked.

The Court: Could someone attend to that while you go on with this? I would like to finish this part of the case this evening.

Mr. Grimes: Perhaps we could enter into some other stipulation then we can let these witnesses go.

The Court: Before you get into that I think it would be the proper thing for us to do, if you have some compilation of these interviews, I think the Attorney General should be [fol. 359] supplied with that so that his work would be easier.

Mr. Grimes: Yes. We will be very happy to do that. As a matter of fact I planned to offer the survey in evidence on the theory it was merely a compilation of what has been testified to, together with an explanation which is also in digest form, of what has been testified to by the Professor.

Mr. Rollins: Do I understand the balance of these questionnaires, they have been offered?

The Court: Yes, they are all offered in evidence, subject to your objection.

Mr. Rollins: On the ground they are incompetent, irrelevant, immaterial and specifically upon the ground it is hearsay.

Mr. Grimes: May I at this time—

The Court: Why not mark this one exhibit T.

Mr. Grimes: It was testified there were prelisters whose job was to go out and make sure the aerial photograph was right.

The Court: Yes, that there was no change in condition.

Mr. Grimes: That there was no change in condition, and there were 19 of those persons. We have at least some of them here and can produce the rest. I do think that would be an appropriate subject for stipulation.

The Court: State the stipulation, and see how Mr. Rollins reacts to it.

Mr. Grimes: I think if I could call one witness we could get on faster.

[fol. 360] WALTER OHNMACHT, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Where do you reside?

A. 131 North Seventh Street, Lindenhurst, New York.

Q. What is your occupation?

A. I am a student, Hofstra College.

Q. You have some other type of job?

A. Yes, I have.

Q. What is that?

A. I am a bonded deputy sheriff, County of Suffolk.

Q. Did you work on the Hofstra survey?

A. I did.

Q. Did you work specifically as a pre-lister?

A. No.

Q. Did you do pre-listing work?

A. Yes, I did.

Q. You did work other than pre-listing also?

A. I did.

Q. And you were an interviewer?

A. Yes.

Q. Were you a tabulator?

A. Yes.

Q. And a coder?

A. Yes.

Q. I show you a document which is No. 29 and ask you to state without reading into the record, what that is, please.

A. It is a map showing cluster number 53, which is in Massapequa.

Q. What did you do with reference to that document which you have in your hand?

A. When I received it I was given instructions.

Q. By whom?

A. By Dr. Chappell.

Q. To do what?

A. To start at the area marked start, and proceed according to arrows and list all dwelling units in that area.

[fol. 361] Q. Cluster 53?

A. That is right.

Q. Did you follow instructions?

A. I did.

Q. Make a list?

A. I did.

Q. Are they in your handwriting?

A. They are.

Q. Were they an accurate list of the dwelling units you found in the area?

A. Yes.

Q. What did you do after you had completed that list, turn them in?

A. I returned them to Dr. Chappell.

Mr. Grimes: I offer this is evidence.

Mr. Rollins: Objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: I will receive it.

(Paper received in evidence and marked Defendant's Exhibit U.)

Q. That operation was known as pre-listing?

A. That is correct.

Q. Would you describe briefly to the Court what you did in connection with that? Make it very brief, please.

A. Surely. I started at a point marked start, and I went to that point and I started listing the dwelling units around the block.

Q. Making any appropriate notation?

A. That is right.

Q. You continued the process?

A. That is right, all the way around.

Cross-examination.

By Mr. Rollins:

Q. When you say you are a deputy sheriff, you do not say you are on the public payroll?

[fol. 362] A. Occasionally, yes. I am not a steady deputy, but I do get paid when I work.

Q. You mean you are on a temporary job.

A. That is right.

Q. It is not honorary?

A. No, no. I get paid.

Q. Since when have you been a deputy sheriff?

A. Approximately two years.

Q. You are called on special jobs to assist the Sheriff?

A. I am attached to the District Attorney's office.

Q. You get paid on a per day basis?

A. Per day basis.

Q. You are not a licensed private detective, are you?

A. I am not.

Q. You were not employed on this survey by a licensed private detective, were you?

A. No.

Q. You got paid for your job? Got paid for it?

A. Yes.

The Court: We have that in the record already. You cannot have it any better than I stated it.

Mr. Rollins: I move to strike out the witness's testimony upon the ground it is incompetent, irrelevant, immaterial, and upon the further ground his part in formulating the so-called Hofstra poll or sample was in violation of the provisions of Article 7 of the General Business Law.

The Court: Denied.

Mr. Rollins: Exception.

Mr. Grimes: We have 18 other such witnesses. I suggest a stipulation they would testify in substantially similar manner except for position. They followed instructions—

[fol. 363] The Court: Do not enumerate. Substantially as the witness?

Mr. Grimes: Substantially as the witness testified.

Mr. Rollins: I make such stipulation without admitting the truth or accuracy of the testimony, and also subject to my objection that the testimony, evidence thereby adduced is incompetent, irrelevant and immaterial; upon the further ground that acts testified to by this witness whose testimony I now stipulate tends to establish they have gathered evidence contrary to Article 7 of the General Business Law.

The Court: All right. With the stipulation before the Court you can eliminate that.

Mr. Grimes: I wish to offer in evidence all the other of these sheets.

The Court: Subject to the Attorney General. Did you offer that one?

Mr. Grimes: Yes, this is in evidence.

The Court: Subject, then, to the Attorney General's objection? That he stated with respect to other exhibits on polls these will be received in evidence and marked Exhibit C Count them.

Mr. Grimes: These cover all 60 clusters.

The Court: That these exhibits cover all 60 clusters. Will you stipulate all persons who counted dots if called, would testify they counted the dots accurately and reported to the supervisor of the Hofstra poll an accurate count of dots.

Mr. Rollins: I will not stipulate that as a fact, but will [fol. 364] stipulate and do stipulate that if called as witnesses they would say that they counted the clusters in each instance accurately, subject to my objection such testimony is incompetent, irrelevant and immaterial.

The Court: I overrule the objection. That concludes that proof?

Mr. Grimes: Yes.

The Court: So you will not have any error we can adjourn at this time and you can pick that up tomorrow.

Mr. Grimes: We have produced in court the balance of the aerial photograph, of which these represent five sections.

The Court: I do not see what difference it makes. Do you want to put them in evidence, too?

Mr. Grimes: I would like to ask whether the Attorney General in regard to aerial photographs in using the word, competence in any way challenges their authenticity.

Mr. Rollins: No. I say I will stipulate as a fact such was taken.

Mr. Grimes: That it is accurate?

Mr. Rollins: That it is accurate.

Mr. Grimes: I wanted to clarify that. I think that concludes this phase of the case. We will call Professor Brumbaugh.

The Court: I think it is an appropriate time to recess. Adjourned to tomorrow.

[fol. 365]

Mineola, New York, January 31, 1951.

TRIAL CONTINUED

Mr. Rollins: Is it possible for me to put Mr. Ludemann on the stand?

The Court: What additional proof have you to offer?

Mr. Grimes: Completion of the Hofstra poll now, which we have the documents in evidence will consist largely of a tabulator who will testify the results were accurately tabulated under his supervision, three witnesses, one to express his opinion as to the accuracy of the poll, plus Mr. Simmons, who will be recalled to examine the possibility of the margin of error in this type of poll, and the degrees to which they occur; the margin there will not exceed a certain amount either way, specifically on this type of poll, why this was selected.

The Court: That will treat with the poll?

Mr. Grimes: That will treat with the poll. I propose to call three bank officers to testify on the interior arrangement of the bank.

The Court: Now I will hear your application.

Mr. Rollins: Mr. Ludemann has been serving for many years in the State Banking Department and is well versed by education and experience to give the purposes and functioning and banking patterns of the State of New York from [fol. 366] its inception. I intend to prove through him various phases thereof, also the policy of the department, and their interpretation of the statute as to what constitutes the word, equivalent of the word, savings, savings, their practices and rulings, and to establish that various terms like thrift account, special interest account and compound interest accounts—

The Court: I do not want the details. You want this gentleman, who is familiar with this subject, to testify out of order?

Mr. Rollins: Yes. He is an executive of the State Department, and one of the chief deputies of the Superintendent of Banks of the State of New York.

Mr. Grimes: I have no objection whatsoever to his being called out of order. I understand he is being called in rebuttal?

The Court: Yes.

Mr. Grimes: I might have an objection on that ground.

The Court: You are not waiving any objection. You are just giving your consent he be called out of order.

Mr. Grimes: To that I have no objection.

FRANCIS J. LUDEMANN, called as a witness in rebuttal, in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Rollins:

Q. Where do you reside?

A. 236 Abingdon Road, Kew Gardens, Long Island.

[fol. 367] Mr. Grimes: I request that the stenographer take all colloquies, especially any question that may be addressed by the Court to the witness. I do not believe that has been the practice, but I believe it will be important.

The Court: All right. I would like to confer with counsel a minute. I am devoting the rest of the week and as much more time as needed to complete this law suit.

Q. Mr. Ludemann, have you an official connection with the Banking Department of the State of New York?

A. I am Deputy Superintendent of Banks in the Banking Department of the State of New York.

Q. Where are you stationed?

A. New York City.

Q. How long have you been a Deputy Superintendent of Banks of the State of New York?

A. For just short of fourteen years.

Q. Have you been connected with the State Banking Department of New York in any other capacity?

A. I have been connected for a total period of approximately twenty-one years. An earlier period I was there in the capacity of Bank Examiner.

Q. Have you held other positions outside of Bank Examiner and Deputy Superintendent of Banks?

A. Within the Banking Department?

Q. Yes.

A. No, although as Bank Examiner some of my time was spent in the field of examination of institutions, about three years, and about four years in the office assisting deputies [fol. 368] at that time in the supervision of some miscellaneous types of institutions we have, such as credit unions, investment companies and private bankers.

Q. Are you in the competitive Civil Service class of the State of New York?

A. Yes, I am in the competitive Civil Service.

Q. Have you had any education, academic education in the field of economics?

A. I am a graduate of N. Y. U., school of accounts, with a B. C. S. degree. I am also a graduate of the American Institute of Banking, of their banking course.

Mr. Grimes: We will concede his qualifications.

Q. Have you any other academic training or learning?

A. I hold a certificate to practice as a certified public accountant in the State of New York.

Q. How long have you been so licensed by the State of New York?

A. For about ten years.

Q. Have you been employed in a bank in your lifetime?

A. Yes. Prior to my going with the Banking Department I was employed for about eleven years in a small commercial bank in Brooklyn, Hamilton Trust Company, which later merged into and became a branch office of Chase National Bank.

Q. Did you work for Chase National Bank?

A. I worked for Chase National Bank, I figure about five or six of those years. It was in the capacity or status of a branch of Chase.

Q. What were your duties?

A. I ran the gamut of all functions, going in as a runner [fol. 369] working on the filing of checks, on individual ledgers; I worked in the rack department, receiving teller and paying teller, and concluded, I was in the trust department at the time I left the bank.

Q. Chase National Bank was a National Bank as distinguished from a commercial bank licensed by the State of New York?

A. Yes.

Q. You said something about passbook account department. What do you mean by that?

A. I don't believe I said that.

Q. Are you acquainted with banking patterns in the State of New York?

A. Yes.

Q. Will you please state what that pattern consisted of?

A. To discuss it quickly, New York has its own pattern of banking institutions, it is not identical with that of other States; it consists in a good part of institutions set up for special objects and restricted in their activities and in the character of assets they can invest in, to those objectives. In the type of financial institutions that take the funds of the public we have three main classes of institutions, we have commercial banks, we have mutual savings banks, we have savings and loan associations; the earliest is the commercial bank; I think the history began about 1791 when the first commercial bank was chartered. Up to about a hundred years ago, say to about 1850, the function of a commercial bank was pretty much to lend its credit by issuing its own bank notes which are payable in gold and currency, and circulate as money. About that time deposit currency, or what we call a check on a commercial account began to come in, although note issue was the most [fol. 370] important, as shown to some extent by the situation when National banks were created in 1863. Three years later a tax was put on State bank notes, and the number of State chartered banks dropped from 340 to 60 between 1865 and 1867, but about that time deposit currency came in much stronger and the State system picked up again, so we had originally the printing of note issues of the banks, then deposit currency. So far as time accounts were concerned, commercial banks apparently did not come in the field to any substantial extent until say about the beginning of 1900. That move was accelerated by a number of things. In 1913 the Federal Reserve Act was passed which created reserves against deposits, and they distinguish between the rate of reserves on time deposits, which was three percent and the rate of reserves required on time deposits which varied in accordance with the size of the com-

munity, running from seven to ten, to thirteen, thirteen being applicable to central reserve cities, New York and Chicago, so that these reserves which immobilized in effect a certain portion of investing people's funds of the bank by being kept in a Federal Reserve Bank as a reserve gave impetus to time accounts, because the reserve was less. We had a sort of secondary impetus in the passage of the McFadden Act in 1927, which gave the National banks the power to have a branch in their own cities if it were not in conflict with State law. Then the conditions in the late twenties were such that lending rates were high, and particularly the Stock Market was active in the late twenties, you had to find where loan rates were higher, particularly [fol. 371] Stock Market loans were active and yielded higher rates, so that many of the commercial banks went in more keenly for time accounts.

Mr. Grimes: I think I shall object at this time. It is interesting, but I think he has gone rather far afield, unless there is some specific proof which would make it relevant in some way.

Mr. Rollins: I want to show savings banks, accepted time deposits long before the practice of commercial banks accepting time deposits, and it was not the savings banks interfering with commercial banks, but it was the other way around.

Mr. Grimes: I object to that.

The Court: That would be a conclusion to be drawn if it meant anything, even after it were drawn.

Mr. Grimes: We accept the statute as we find it.

The Court: I think it will do no harm to let this gentleman give us sort of a chronological history of banking in the State as he has given it. True, it is hearsay, except for what he personally touched upon but I think it might make the record complete. As a matter of fact in your opening I thought you contributed wisely to the law with respect to this case by giving us a picture of the conditions at the time of the McCullough versus Maryland decision. This is in the nature of the same thing, and it seems to be in the same vein you spoke of.

[fol. 372] Mr. Grimes: If that is the purpose, I have no

objection. I cannot see the relevance on the Attorney General's part, however.

The Court: I would have to say the testimony is not meeting any issue in the case other than——

Mr. Rollins: I promise the Court it will all be connected.

The Court: All right. I say, up to the present time it is giving us a picture and background which may explain some things that are somewhat isolated.

Mr. Grimes: Very well, sir. I have no objection.

The Court: If you want to press your objection, let it stay on the record, and I will overrule it. I think that would be the better, lawyerlike way for you to proceed.

Mr. Grimes: Very well.

The Court: I will overrule Mr. Grimes' objection.

The Witness: That led commercial banks to seek more aggressively passbook accounts, which are one of the categories of time deposits.

Q. When you say passbook accounts, what do you mean?

A. A passbook account has ordinarily two features, one that no payments are received, more particularly withdrawals are not permitted unless the passbook is presented at the institution; and, secondly, there is ordinarily a time clause associated with it which gives the institution [fol. 373] the right, if it so chooses, to demand notice, generally runs 30 days or more.

Q. Is that the reason why the term time is applied to a deposit?

A. Time deposits, generally speaking, at least for reserve members in a Federal are deposits that are not payable except on 30 day notice, or within 30 days of any given date.

Q. As distinguished?

A. As distinguished from a demand deposit where they come in and get payment on request or demand.

Q. Did I understand you to say because of the McFadden bill which allowed branch banking plus speculation in the Stock Market commercial banks adopted a more aggressive policy to get passbook accounts?

A. Yes.

Q. I mean, they were incentives to develop that aspect of their business, commercial banks wanted more money to loan at high rates for Stock Market purposes?

A. You may put it the other way, investment opportunities being advantageous they sought to get as many as they could and it chose the avenue of developing passbook accounts as one source to get funds which they could employ in that profitable market to increase their income.

Q. When was it?

A. My best recollection is just before the Stock Market crash in the latter part of 1929, call loan rates were as high as ten percent. Following the stock market crash and the bank holiday commercial banks, at least in New York City, lost a good bit of their previous interest in pushing the passbook accounts where they paid special rates of interest, or higher rates than they could on checking accounts at that time, and in effect, discouraged passbook accounts by [fol. 374] reducing the rate of interest they paid to quite low levels, they went down as low as about three-quarters of one percent, and at least one bank in effect wrote letters to these passbook accounts inviting them to withdraw them. That was an incident of early 1930. More latterly, in 1933, the statutes prohibited payment of interest on demand accounts, so that there is again in the present picture an incentive to develop passbook or time account business. Savings bank history starts a little later; 1819; they were originally organized to help servants, laborers, people of small means, to encourage them to save money and give them the benefit of the accumulation of interest. They took form at that time, being somewhat philanthropic history.

Mr. Grimes: I must object to this.

Mr. Rollins: Your Honor can take judicial notice.

The Court: I will allow it. It is his observation of the practice in the banking business, is that right?

The Witness: I am trying to tell of general incidents and general policy.

By the Court:

Q. These are your own observations and conclusions?

A. That is right. They can be found reported in books giving the history, if you want to consult them.

The Court: I overrule the objection.

The Witness: Savings banks started as—somewhat from

[fol. 375] philanthropic motives, you found prominent citizens setting up savings banks, which was set up in corporate form, although there was no stock, they were just the deposits and initially small funds to be put up by the incorporators to act as a guaranty fund which was subsequently replaced by earnings in the savings bank itself, and they built up their own surplus funds, they were mutual, and by the history of investment, the powers of savings banks have always been in a very restricted area, so-called statutory local laws which set forth the qualifications that must be met by investment before a savings bank could meet it, and later they let them invest in secured obligations, that is, those secured by real property, those secured by investment, that they could invest in directly themselves. The concept gradually changed, philanthropic concept as the savings bank grew bigger, but it continued to be directed at serving the average person for his savings as evidenced by statutory limitations on the maximum amount that could be accepted from any one depositor, that was increased from \$3000 to \$5000 in 1920, and from that \$5000 to \$7500 in 1926, which is the present level. Savings and loan associations got a somewhat later start, I would say just prior to the fifties they started on the principle that time it was virtually impossible to obtain mortgage funds, so instead of a man patiently saving until he got \$2000 or whatever was [fol. 376] required, then building his house, ten of them would act together and each of them would put aside a certain sum a week and when the first \$2000 was gathered it would be bid for and that fellow could then start building his house, and he could continue to make repayment of his loan, sort of revolving fund money, people interested in building their own homes, to allow them to do it earlier than by first having to make complete savings. That concept changed over a period, people put money in savings and loan associations, and were not interested in homes as a good investment. That, in concept to organization, is still somewhat different from the stock concept in a commercial bank, and now no stock concept in a savings bank. Here you had a share corporation, whereas money that was put in was put in as the owner's, but unlike a stock corporation

it was withdrawable on request, and subject to the ability of the association to meet the withdrawal.

Mr. Rollins: Savings and loan?

The Court: Savings and loan?

The Witness: It is a share corporation, but not a stock corporation, but traditionally you have a savings and loan association interested primarily in financing of small homes. To sum up, in effect you have commercial banks primarily interested in making loans to business, and in the handling of checking currency; at this time the savings banks in promoting and catering to the savings needs of the middle [fol. 377] income group, or small saver on a mutual concept, with investment being somewhat limited in area, and the savings and loan catering to primarily the financing of small home mortgages.

New York has other specialized types of institutions. It has credit unions which are somewhat like a savings and loan, in that they are a share corporation, but not a stock corporation, the difference being they make an unsecured loan to their members in limited amounts, and later days they were confined to people having some outside common interest, such as a common employer, or membership in a labor union. We have industrial banks which, similar again to the commercial banks, although they cater particularly to making loans to salaried people or to small businesses, but you have a rough pattern of specialized type of institution for special, or to aim at particular segments or aspects of the public or economic life, and I might say in passing that the mutual savings bank is not a common thing throughout the United States, it is limited principally to New England and the Middle Atlantic States. There are mutual banks only in 17 of the 48 States.

By the Court:

Q. Did you say mutual banks?

A. Mutual savings banks.

Q. That is not New York?

A. Yes, New York are mutual savings banks.

[fol. 378] By Mr. Rollins:

Q. What does that mean?

A. By mutual is one in which there are no equity interest, that the bank is owned by the depositors, that all income after payment of expense goes to the benefit of depositors, either in the form of dividends or retention of dividends as surplus to provide a margin of protection.

Q. There is no outstanding stock on which profit is paid by any holder?

A. No.

By the Court:

Q. The surplus of a savings bank is divided in what way?

A. I said, sir, that earnings after expense are either distributed as dividends to depositors, surplus earnings if you will, either distributed to depositors in the form of dividends, or retained by the savings bank in undivided profit, if you will, or surplus, as a margin of protection for the depositors.

Q. Is that money ever paid to depositors as dividends, or is that just that they can do it?

A. Oh, no. Under the statute dividends can be paid either semi-annually or quarterly, and they are paid at least semi-annually or more frequently in every savings bank.

Q. Is that a regular practice, to pay dividends, by savings banks?

A. Yes.

Q. That is not applying it as interest?

A. That is what I was just going to say. It is colloquially known as interest on your account.

Q. That is what I understood.

A. In other words, we have a debtor and creditor relationship, and we have a corporation making earnings, but there is no promise of what rate is going to be paid. It waits until the end of the financial period, at which time the trustees of the savings bank would review earnings and declare in accordance with their financial position, what ever dividend they felt was warranted, retaining the balance within the corporation for surplus protection, and that dividend is colloquially known as interest on your savings account.

Q. The old-fashioned way that my grandmother indulged in was to personally carry her book down and stand on line at a certain period of the year and have something entered in that book which added to her deposits.

A. That is correct. That is what I am calling dividend, which is frequently called interest. In other words, it is their share of earnings for that period distributed.

Q. What is the distinction between a commercial bank and a savings bank?

The Court: In what respect?

Q. In regard to distribution of earnings?

The Court: I think he already stated. Let him state it.

The Witness: I presume what you are referring to is in the treatment of passbook accounts in a commercial bank.

Q. I mean commercial bank—

The Court: I think what counsel wants to put on the record is in a commercial bank the profits go to stockholders; [fol. 380] the savings bank, what we will call profits go to depositors.

The Witness: That is correct. In the commercial bank payment is made as interest to passbook accounts which is treated as expense of operation, the remaining profit going to stockholders.

By the Court:

Q. That is passbook accounts in the commercial?

A. That is correct.

Q. I was speaking generally about the profit of a commercial bank. They confine their earnings to stockholders?

A. That is what I said later and the party did not read after—

The Court: Leave that out. That was just comment to me. Leave out about did not read.

By Mr. Rollins:

Q. Do both banks, commercial and savings banks when they receive deposits and pay upon withdrawals use the passbook system?

A. I do not think there is any distinguishing difference in the method of handling between the handling of a passbook account in a commercial bank and a passbook account in a savings bank. Do you want me to elaborate?

The Court: Yes.

The Witness: A customer brings in his deposit with a [fol. 381] passbook, enter the amount to his credit. In every case, if he wants to withdraw he signs a withdrawal slip, brings in the passbook, receives the money and a debit is entered in his passbook.

Q. That is a passbook issued by both the commercial bank and saving bank?

A. Some rough form of passbook, place provided for debit, credit and balance, same form.

Q. That would be a time deposit?

A. In both cases they would be time deposits.

By Mr. Rollins:

Q. Are there any advantages or disadvantages in the form of restriction in the type of business conducted by a commercial bank and a savings bank?

Mr. Grimes: I am going to object to this question.

The Court: Do you mean in the investment field, or reception field of money?

Mr. Rollins: In the reception field and——

The Court: You are asking for a comparison between a commercial bank and a savings bank.

Mr. Rollins: Savings bank.

The Court: Do you think the gentleman can tell us any more on the receiving of money than he has told us?

Mr. Rollins: Yes, it is a matter of fact——

The Court: Just a minute. Is there anything about the receiving of deposits in a savings bank, and we will call it passbook account in a commercial bank that you [fol. 382] have not told us and that you would like to add to this exposition?

The Witness: There is a difference. One is relating to passbook accounts and as relating to other powers of commercial banks to receive deposits. In a savings bank they

can only take a time deposit. They are restricted by statute to \$7500 for an individual, to take from him and they cannot take any funds of a corporation. In the commercial bank, in addition to the power to take time deposits, which they sometimes do in the form of passbooks, they can also take check deposits which savings banks cannot do, and they take funds from corporations as well as individuals.

By Mr. Rollins:

Q. Is there any restriction on time deposits as to the amount they will take or could?

A. I know of no restriction.

By the Court:

Q. When you speak of a commercial bank, you mean a National bank as well as a State bank in every instance?

A. Yes.

By Mr. Rollins:

Q. Are there any advantages and disadvantages in powers and restrictions in respect to investors?

A. I described pretty much the savings bank power which is the likely loss of investment supplemented by such additions as might be approved by the Banking Board, and the power to invest in mortgages. In commercial banks they have the additional power to make an unsecured loan, and included in that the power to make a personal loan at rates higher than the ordinary six percent, usury rate. To some extent the mortgage powers of a commercial bank are less broad than those of a savings bank.

By the Court:

Q. When you speak of those powers in a commercial bank, are you speaking strictly of passbook money?

A. In a commercial bank there is no restriction that requires you to distinguish between the money obtained from checking, deposits of money obtained from passbook deposits; it is not segregated in New York State, or subject to any particular requirement as to how it be invested. You do have limitations that investment in mortgages cannot

exceed a certain relationship to time deposits, but it does not force you to invest them in that particular type of investment. You have one other distinction which relates neither to deposits nor to assets, and that is the question of branch powers. The commercial bank branch powers in New York State are much greater than those of the savings banks. The savings can only have a branch within its own city, and in a city divided into boroughs or counties, within the same county, and they are limited as to number. If the population is a million or more a savings bank can have three branches; if it is over 250,000 and less than a million, two branches; if it is in a place of 30,000 or more and less [fol. 384] than 250,000 one branch. There is no power given to savings banks to have any branch outside their own city limits, and only to have a branch within the city if the population is 30,000 or more. In commercial banks there is the same power to have a branch within the city, that is, there can be a branch in any city of 30,000 or more population in a city, but there is no restriction as to total number, they can have, no limitation as to number within the city, although there is a requirement the amount of their capital exceed by \$50,000 for each branch, minimum capacity requirement under State law, but ordinarily banks are so well capitalized in excess of minimum requirements there is a substantial latitude as to the number of branches. In addition so far as commercial banks are concerned New York State is divided into banking districts. For this area, which is the first banking district which comprises the County of Kings, Queens, Nassau and Suffolk the proviso in effect is that a commercial bank may have a branch in another city or village within the same banking district providing there is no other branch located there, unless they would acquire such a branch by absorbing an existing institution in that area.

Q. Franklin Square, Nassau County, wherein this defendant is located, has a savings bank?

A. No.

Q. If there was a savings bank in that particular locality where the defendant bank is located, Franklin Square, could it open a branch office?

A. On the assumption I think I am correct, the zone

Franklin Square is a place under 30,000 population, so I don't even know whether it is a city, I [fol. 385] think it is not even a city *even a city*, but answering on those assumptions I think they are correct, a savings bank could not have a branch either within Franklin Square or elsewhere in the banking district outside of Franklin Square.

Q. Entire Nassau County?

A. Entire Nassau County, right.

Q. That applies to Nassau County, no branch could have been opened in Nassau County assuming there had been or there was a savings bank in Franklin Square?

A. A savings bank in Franklin Square would have no power to open a branch anywhere.

By the Court:

Q. Because it is under 30,000?

A. Right.

By Mr. Rollins:

Q. The defendant in this case has three branches in addition to the main office in Franklin Square?

A. That is my understanding, knowledge and belief.

Mr. Grimes: I do not understand the purpose.

The Court: That point you are now raising is in the record beyond dispute. It was testified the bank has altogether three branches.

Mr. Rollins: Altogether four, one Levittown, Rockville Centre—

The Court: That is all in the record. The witness [fol. 386] says he understands that to be so.

Mr. Grimes: Is there any purpose in it? We have a main bank and we have three branches. We are well under 30,000, Franklin Square.

Mr. Rollins: My purpose is to show they are in a better position than a savings bank, and the savings bank is not competing with them.

The Court: He would have a right to ask the witness how many branches it has. I will allow it. This is direct testimony.

Mr. Grimes: Yes. I do not object to that.

Q. Are you acquainted with the provisions of Section 258 of the State Banking Law?

A. Yes.

Q. Could you tell me whether under that provision the State Banking Department has considered during the years since its existence that the terms in advertising reading, solicitation of time deposits account by commercial banks, such as special interest account, compound interest account and thrift account would be violative of the provisions of that Section?

Mr. Grimes: I object to that.

The Court: I will have to sustain the objection. It does not matter whether the Banking Department considered it. That might be something for cross examination to show acquiescence.

Mr. Rollins: Your Honor is stating to me that the term, [fol. 387] equivalent, that wherein commercial banks are restricted in the use of the term, saving or savings, your Honor intimated to me the word equivalent means something to me?

The Court: That is right.

Mr. Rollins: I felt by that remark the Court believed actually the use of the term, special interest account, compound interest and thrift may be violative of the Section, by the ruling of the State Banking Department, and hence, and making it impossible by the use of those terms by a National bank of performing its natural banking function. If your Honor feels the term equivalent, term saving or savings, and the interpretation of the statute by the Court is ambiguous, I am prepared to offer proof by this witness by the question I propounded, by the practice of the Banking Department of the State of New York and its interpretation would aid the Court in its interpretation of the Statute. That is my sole purpose in asking that question, and to show that actually employed by commercial banks, inclusive of National banks, by the use of the three terms is not violative of the section unless your Honor makes a ruling the statute is ambiguous, but if the Court feels the statute is unambiguous I am willing to offer proof by this

witness to aid the Court, which would be admissible in evidence.

The Court: Before you make an objection let me ask the witness this question, bearing on that subject.

[fol. 388] By the Court:

Q. Does the Banking Department have regulations formally promulgated?

A. No, sir. You mean on the subject?

Q. On this subject.

A. That is what I understood you to mean.

Q. Is there any formal action taken by the Superintendent of Banks with respect to this subject? That is the treatment it as to his employees for instance, or direction to the commercial State banks, is there any formal action that has been taken by him?

A. Well, to answer it within the limits of what you have said, where we have observed the private banker—

Mr. Grimes: I am going to object to the answer unless you confine yourself strictly—

The Court: Let Mr. Ludemann answer, and then you move to strike it out, because I really only want the formal conduct on the part of the Superintendent of Banks. Go ahead.

The Witness: We have had cases where a private banker would use the word, savings, in conjunction with the solicitation of passbook accounts with him. If we found that we would write to or tell him that we deemed it violative of that provision, and as a matter of supervisory policy would see that he desisted.

Q. That would be the individual case?

A. That is right.

[fol. 389] Mr. Grimes: I move to strike it out.

The Court: Yes. That will be stricken out as not responsive to my question. My question is, and I think you have enough official background to understand it, is there any formal action which covers a field, entire field, or a limited field that has been taken by the Superintendent of Banks with respect to the provisions of Section 258 treating with said bank?

The Witness: May I ask you a question?

The Court: Yes.

The Witness: Do you mean by that, have we ever put down in a written statement we deemed it to mean this or do you mean we have a policy we followed?

By the Court:

Q. No, I am not asking for policy now.

A. The answer to your question is in the negative, there is no formal action.

Q. There is no regulation on the subject? Now you complete that by saying there is no formal direction from the Superintendent of Banks treating with that subject?

A. That is right.

Mr. Rollins: I think if he had official cognizance those terms had been used, and they did nothing about it—

The Court: There was to be an objection by Mr. Grimes.

Mr. Grimes: Yes. I object to any interpretation or attempted interpretation of the term by this witness.
[fol. 390] The Court: Your application was really a motion to strike out. He had answered.

Mr. Grimes: I thought that had been granted by the answer to your question. I also meant to strike any answer to the previous question along the same line. Is that granted?

The Court: You have your motion, and the witness answered before I questioned him. I think that I must sustain the objection.

Mr. Rollins: I respectfully except. I am prepared now to offer proof the State Banking Department of New York, State of New York, through the years commencing from the year 1920 up to the present date had officially—that National banks and commercial banks in the State of New York in advertising for savings accounts in the newspapers of the State of New York, had used the terms thrift account, special interest account and compound interest account, and in an attempted compliance with Section 258 of the State Banking Law, and—

The Court: Leave out of that offer the operation of their minds, leave out the motives. You are making an

offer of proof. You could not prove what these banks had in their minds. Just leave that out.

Mr. Rollins: That they advertised for time deposits, and used the term in describing them those accounts alternately thrift account, special interest account and compound interest account, and that the State Banking Department took no official action, although they knew of it.

[fol. 391] Mr. Grimes: I object to the form of the question.

Mr. Rollins: Showing the conduct of the State Department, and that would tend to establish I might say by indirection or inference their interpretation of the statute, and I also state it is presumed in point of law that the State officials are deemed to comply with the law in the performance of their duty.

Mr. Grimes: I object to the form of the question and the numerous statements made, also the substance. Is it now an offer of proof?

The Court: It is an offer of proof. The substance of this offer of proof is as I understand it, that, although the State Banking Department knew that these three terms we discussed were being used by the commercial State banks it took no action against those banks because, and you want to prove this also, the State Banking Department concluded that the use of those terms was not a violation of Section 258.

Mr. Rollins: Yes, by knowledge of that fact, and consequently the presumption of law that each public official's knowledge of the facts is presumed to have performed their duties.

Mr. Grimes: I object.

Mr. Rollins: And that conduct of a State agency charged with the enforcement of any particular statute which may be considered ambiguous tends to aid the Court upon [fol. 392] proper construction of the statute under the rule or principle of law applicable.

Mr. Grimes: I object.

The Court: I will sustain the objection to the offer of that proof. I do not consider that the conclusions of the Banking Department as to what is or what is not a violation of Section 258 would be binding upon the Court or even would be any aid to the Court in the interpretation of the statute.

Mr. Rollins: The only reason I offer it is because the inference I received from the Court's statement the word equivalent means—equivalent means savings. I felt the Court thought it was an ambiguity. I say the conduct of the agency and their policy in the cases I have given tends to aid the Court on a proper construction.

Mr. Grimes: May I ask this question?

The Court: I have passed on this subject. I have sustained the objection to that offer of proof.

Mr. Rollins: I respectfully except.

By Mr. Rollins:

Q. Would the word, savings be equivalent to the term, saving or savings as stated in the statute?

Mr. Grimes: I will object to this.

The Court: Maybe I could receive that evidence, but the question would have to be worded a little bit different. I think it will ultimately be for the Court to determine [fol. 393] what the word equivalent means.

Mr. Rollins: I submit—

The Court: Just a moment. But if you can develop through an expert witness like Mr. Ludemann that there is a term in the trade, in the business, that is universally recognized, I think I ought to receive that evidence as throwing some light on what that expression saving or savings or the equivalent, I think that is the wording of the statute, or the equivalent, I should receive that testimony, but it would have to come in in the ordinary way that anything else would be brought in where a practice in the trade or calling not necessarily known to the Court would have its peculiarities.

By Mr. Rollins:

Q. Is there an understanding in the banking business as to the meaning of the term saving or savings, or the equivalent?

Mr. Grimes: I must object to that unless the question means merely do they understand the English language, in which case I object upon the ground—

The Court: Mr. Rollins has to begin somewhere to try

to develop this point. Whether he is right or not I want him to have an opportunity to develop it. Suppose we, and I do not feel capable of doing it myself, I think you know more about it than I do, but suppose we begin with it this way: just the same as if it was about the making [fol. 394] of shoes, or how you manufacture automobiles. In the banking business, according to your experience, is there a recognized necessity for making a distinction in the prosecution of the business between the use of the word saving and savings and any other word, in advertising?

The Witness: That is hard to answer, except by observation and I would make——

By the Court:

Q. You have to answer from your experience, and it will have to be notorious enough so that everywhere you went they would have that understanding?

A. Allow me to try to answer it.

Q. Could you answer yes or no to begin with? Is there of necessity in the banking business a recognized distinction as to the use of those words in advertising? Would you say yes or no?

A. I am puzzled by the word, necessity as you phrase it. Do you mean do they?

Q. Leave out necessity. I put it in for a purpose.

A. I will say yes to that, then, my understanding.

The Court: You say there is a recognized distinction in the banking business in using those words in advertising. He just says yes to that broad question.

By Mr. Rollins:

Q. What is that difference?

A. Savings banks use the word in their advertising. Commercial banks refrain from using the word in their advertising; by that I mean the word saving, savings or saving.

Q. Does that include foreign languages?

A. If they would be advertising in foreign languages, the commercial banks would not use the foreign language equivalent.

Mr. Grimes: I move to strike out the answer to those questions, foreign language, his observation of what banks do.

The Court: Yes. We will have to strike out those answers. I can only receive this testimony if it is a recognized practice, so you will have to put your questions in that form in each instance.

Mr. Rollins: To use the word saving or savings?

The Court: Yes, or not to use them, or to use those other words. You can go on with all of them. I asked the witness if in his experience there was a distinction in the the business and he answered yes to that.

By Mr. Rollins:

Q. There are two different classes of banking, commercial and savings?

A. Yes.

Q. Is there a distinction in the term saving or savings in the banking business?

A. Yes.

Q. Give us the distinction.

A. Savings banks use the word savings and commercial banks do not.

Mr. Grimes: I make the same objection.

The Court: Let me ask this question. Maybe it will cure the objection.

[fol. 396] By the Court:

Q. Is that a recognized practice in the banking business?

A. It is recognized by the fact that advertisements are public, circulars are distributed; you see in the circular distributed by savings banks the use of the word savings; I do not observe in the material distributed by commercial banks the use of the word saving or savings.

Mr. Grimes: May I move every answer—

The Court: I want to ask one more question to try to make his answer stand, if I can.

By the Court:

Q. In answer to that last question you spoke of your own observation?

A. Right.

Q. What we say is law. You are thinking out loud. The question was not your observation. The question was as a general practice in the banking business is the use of these words recognized as distinctive terms having application to particular activities in banking?

Mr. Grimes: I hesitate very much to object to the question you ask, but I feel I must. It has no bearing upon the issues in this case, and does not aid the Court in the construction of the statute.

The Court: I will say this, that if the Attorney General can establish that there is a trade practice in the use of [fol. 397] these words or in his use of these words, and I am including all the words, the whole four or five, I would allow him to put that on the record if there is such, but all we have on the subject is the one answer, that there is a distinction. He has said there is a recognized distinction in the banking business. That is not enough to establish a trade practice.

Mr. Grimes: No, sir, especially now where if there is a distinctive use it presumably comes from the fact there is penal statute on the subject.

The Court: Any kind of trade practice that is violative of the law is never allowed to be established, but I think we ought to have it, if it can be done. I am not so sure there is this trade practice.

Q. Is there a trade practice by banks?

The Court: I think the objection to the Court's question will have to be sustained. What was the other motion?

Mr. Grimes: There was a motion to strike it out, all answers to the questions on that subject.

The Court: I will strike out those answers. They were not responsive to the questions. The gentleman was giving his own personal observation, whereas the Court has ruled the question must treat with trade practice, not individual observation.

[fol. 398] By Mr. Rollins:

Q. We are not concerned with what you think. You know the trade practice in banking?

A. Yes.

Q. That is because of your association with the Deputy Superintendent of Banks?

The Court: His long experience.

Q. Your long experience working in the banking business?

The Court: He has given us that.

Mr. Grimes: I concede his qualifications.

Q. Is there not a trade practice in advertising for time savings accounts by savings and commercial banks in the State of New York?

Mr. Grimes: Objection.

The Court: I will allow that.

Mr. Grimes: Just yes or no?

The Court: Yes. Is there a trade practice?

Q. In advertising for time accounts?

A. Yes.

Q. What is the trade practice in advertising for time accounts by various banks of the State of New York?

Mr. Grimes: Objection.

The Court: I allow that.

The Witness: It is the practice of commercial banks in advertising for passbook time accounts to use terms such as [fol. 399] thrift account, special interest account, compound interest account. It is the practice of the savings banks to use terms such as savings accounts.

Q. Any others?

A. It is found in practice.

Q. Forget about practice.

A. Any others? I cannot get what you mean if you don't mind.

Mr. Grimes: I move to strike the answer, not germane to any issue in this case.

The Court: I will deny the motion. Let it stand.

Q. Is there an equivalent of the word savings, used by savings banks?

A. Yes, savings, yes, money occasionally.

The Court: You are back now to individual cases, and he is answering exactly as you put it. I will have to strike that out because we are only talking about trade practice, Mr. Ludemann, talking about some banks say, save your money.

Q. Talking about all banks, trade practice.

The Court: Mr. Ludemann, keep in mind these questions are directed only to the trade practice, not what some individual bank might or might not do, some recognized practice. As you know, all trades have their practice.

The Witness: I will answer it in that light. It is a trade practice of savings banks through a common advertising [fol. 400] pool that they use to include sometimes in their advertising save your money in a savings bank.

Q. Is there a distinction between the service created to the public, a passbook account and a commercial account in a savings bank?

A. The service that can be extended by a commercial bank is broad. It can accept more money, they can accept money from corporations; there is a distinction in service in this respect, that a savings bank can only invest the funds they receive in savings accounts in a rather restricted area of investment, and commercial banks accounts invest funds it receives in passbook accounts in a much broader area. A savings bank is a mutual institution.

Mr. Grimes: I am going to move to strike out the answer, to the question asked. It was the service. We are getting far afield. What they do with the money after they get it.

The Court: I think it is broader than the question now.

Q. Is there any competitive use in the passbook account, I mean comparatively compared with using passbook accounts in commercial banks and savings banks?

Mr. Grimes: I object to the question, unintelligible.

The Court: You mean from the point of view of the depositor?

Mr. Rollins: That is right.

[fol. 401] The Court: I would have to sustain the objection.

Q. The use of commercial banks by citizens throughout the State, does it vary in various parts of the State of New York as to the number of deposits and the amount of deposits?

Mr. Grimes: I object to the form of the question.

The Court: I allow it.

Mr. Rollins: Question withdrawn.

The Court: Counsel means is business transacted by commercial banks in different parts of the State of New York different from other parts?

Mr. Rollins: No, I don't mean that.

Q. Do commercial banks in the State of New York, outside of the City of New York, receive by comparison more time deposits than do the commercial banks within the metropolitan area, namely, within the City of New York?

A. More outside of New York City than in New York City in proportion to total deposits.

Q. Where would you find that with relation to position in the State of New York?

A. Well, you find up-State in certain places that commercial banks are very active in the solicitation and servicing of time deposits in the form of passbook accounts.

Q. What is the proportion of those time deposits and demand deposits in commercial banks up-State?

A. The total deposits outside of New York City in State commercial banks is about three billion dollars, of which a [fol. 402] little over one billion dollars is in passbook accounts. I state total deposits in State commercial banks outside of New York City is three billion dollars. The total time deposits are one billion one hundred million.

Q. That is a ratio of approximately three to one?

A. About one-third.

Q. How does it compare within the City of New York?

A. In New York City the total deposits of any State commercial bank is fourteen billion, nine hundred twenty-

three million; total time deposits are one billion, fifty-one million, or a ratio of close to fifteen to one.

Q. Is there a reason for it statistically?

A. Statistically I think it depends a good deal on bank policy, on whether it goes out to emphasize that particular phase of business.

Mr. Rollins: You may inquire.

Mr. Grimes: Do you want me to start now, sir?

The Court: Adjourned to 2:15 P.M.

FRANCIS J. LUDEMANN, a witness called in rebuttal on behalf of the plaintiff, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Grimes:

Q. Mr. Ludemann, your total is 35 years in the banking field, 21 and 14?

A. No, 21 years in the Banking Department, 11 years prior, that is 32 years.

[fol. 403] Q. Yes, 32 years?

A. That is correct.

Q. Are savings banks in your opinion in competition with savings and loan associations?

A. I would say that both compete for possible business from the public.

Q. With specific reference to deposits, people's money, are they in competition?

A. Savings and loan associations cannot take deposits.

Q. They take investments, don't they?

A. Yes.

Q. Are people sometimes confused about that, in your experience?

A. I have no way of answering yes or no on it.

Q. Do you have an opinion on the subject?

A. I have no firm opinion as to what is in other people's minds, or whether they are confused between them.

Q. You have no firm opinion?

A. That is right.

Q. You have some notion?

A. I cannot answer the question as to whether or not they are confused. I have nothing I know of that would suggest to me they are confused.

By the Court:

Q. You have nothing to base it on?

A. Correct.

Q. Never made any inquiry?

A. That is right.

By Mr. Grimes:

Q. In your official position you watch advertising of various financial institutions?

A. We don't make a practice of supervising advertising. We do see them from time to time but we have never attempted to supervise advertising.

Q. You yourself, apart from your official duties, and in your capacity as an official interested in banking, you [fol. 404] watch ads. in the State of New York papers?

A. I read them in the Long Island Press.

Q. Savings and loan associations advertise for deposit accounts?

A. I have no recollection of seeing it here; I have seen it once in Poughkeepsie.

Q. Is that the only time?

A. That is the only time I have seen it.

Q. They do advertise for deposits?

A. I never observed that advertising.

Q. Have you observed any advertising by savings and loan associations?

A. Yes.

Q. Which you understand call for people's money, whether by way of investment, deposit, or whatever you call it, those you have seen?

A. Right.

Q. What do they call it?

A. Savings account, or savings shares quite frequently.

Q. Savings accounts or savings shares?

A. Right.

Q. Which of the two, accounts or shares, in connection with savings in your observation is used more frequently?

A. By state associations, by Federal associations, those that are insured with the Federal savings and loan insurance corporation, there is a tendency to use accounts more frequently.

Q. Which are in the majority, Federal or State savings and loan associations?

A. Federals are by size, I would say, also by extent of advertising.

Q. By volume of advertising, whether Federal or State, which words are used with greater frequency, savings account or savings shares?

A. Savings account.

[fol. 405] Q. No question about it?

A. I do not think there is any question.

Q. The great majority say savings account?

A. Correct.

Q. In your opinion are such ads. truthful?

A. All depends on the understanding of accounts. I understand them.

Q. You understand calling them say, savings account that means an investment, doesn't it?

A. I know the structure of a savings and loan association. I know it means a share account in a non-stock corporation.

Q. In your opinion does the public at large understand that difference?

A. I don't know whether the public at large understands it or not.

Q. Has it been a matter of bank discussion, with the exception of the public?

A. I will answer that, we have not objected where we saw our State savings and loan association advertise savings accounts.

Q. You have not objected?

A. That is correct.

Q. Have there been discussions whether or not you should object?

A. People have sent them in to us and say, look what they are advertising.

Q. No official action has been taken by the Banking Department?

A. Not that I know of, no.

Q. So far as you know, that matter has never been considered by any official of the State Banking Department whether or not the ad. of a savings and loan association, whether State or Federal in New York State, involved an element of deception?

A. Are you talking about a particular ad.? I would like to answer you responsively.

Q. I am talking about the great volume of advertisements [fol. 406] of savings and loan associations in New York State which you already testified described their accounts as savings accounts. That is what I am talking about.

The Court: The question is, did that subject officially come before the Superintendent of Banks?

Mr. Grimes: No.

Q. Whether there has been any discussion, official or unofficial, by anybody in the Banking Department as to whether or not ads. of that character might deceive the public?

A. I could not testify. There has been none so far as I participated in.

The Court: That is all you can answer.

Q. You do not know of any such discussions?

A. I don't know of any personally.

Q. Never heard of any?

A. I do not know of any personally or never heard of any personally.

Q. I am going to ask you this in relation to your opinion. What do you think about it, whether it might deceive the public?

A. My opinion is it does not deceive the public. I won't say I am necessarily a representative of public opinion, though.

Q. I did not ask you that. The answer is, it does not deceive the public?

A. Right.

Q. What do savings banks advertise as to their services?

A. Savings deposits generally or savings accounts.

Q. Which of the two is more frequently used in your opinion, if you have an opinion on the subject, based upon [fol. 407] your position?

A. My opinion would be the weight would fall with the advertising of savings deposits.

Q. Quite often savings accounts?

A. That I am not sure of. I would not want to say I ever saw it, never saw it. I think it may occasionally be used.

Q. Is there a difference between a savings account or deposit in a savings bank and a savings account in a savings and loan association, from the standpoint of the availability of money or in any other way?

A. There are differences. The savings deposit in a savings bank is a debtor-creditor relationship. The savings account in a savings and loan association is an interest in ownership. I think there is something further I can answer on it, but I forgot the balance of the question.

Q. I think that answers my question. Since there is merely that element of ownership in a savings and loan association, then deposits cannot be withdrawn in that way, is that correct?

A. (No answer.)

Q. A person, in other words, who has a savings account in a savings and loan association has no right to withdraw, no ability to withdraw his deposit, and no right to withdraw his deposit unless the particular association wishes to let him do so, is that not right?

A. The incident of ability to withdraw is subject to different regulations. In a savings bank there is a right in a savings bank to require 60 days notice; in a savings and loan association you can file a withdrawal and it can be paid in the order of filing as funds become available, and [fol. 408] there is an exception permitting the honoring of an amount up to some small amount out of turn, there is a difference in the way they may be repaid under the circumstances or the desire of the corporation not to meet them promptly, or inability.

Q. Would you regard that as a slight difference?

A. All depends on circumstances. I mean, under some conditions it could be a major difference.

Q. It makes a great deal of difference under some conditions?

A. Right.

Q. In other words, and correct me if I am wrong, if I have a savings deposit in a savings bank payable in 30 days, at the end of 30 days I have a right to demand that deposit back?

A. If you make it 60 days.

Q. Make it 60. Let us make it 90?

A. No, 60 day statute.

Q. All right, 60 days, and if I do not get that deposit back on demand the savings bank has to close its doors?

A. The Superintendent would have the power to take possession.

Q. And he would do so?

A. I presume so.

Q. That is, suppose a savings bank is insolvent.

A. You mean insolvent in failing to meet a demand for a liability? The answer is yes to you.

Q. In other words, a bank as a practical matter would pay or be insolvent and fall in the hands of the Superintendent.

The Court: Leave out insolvent, because it may not be insolvent. Its investments may make it.

The Witness: Except with this exception, that there [fol. 409] exists in the Banking Board of the State of New York power to regulate withdrawals from all banking institutions under sufficient or unusual circumstances, and I believe the power has been used to cover both an individual or universal situation, not recently changed, not, I would say within fifteen years.

Q. Not since the depression?

A. That is right. 1935, let us say.

Q. What happens when a person wants to get his money out of a savings and loan association? Can he do so?

A. He can do so, to the extent that they liquify enough assets and pay according to regulations governing the

manner in which they must honor requests that are filed for withdrawal.

Q. If they do not honor requests that are filed for withdrawal, what happens? In short, the depositor waits?

A. He waits. Do not hold me on this.

The Court: We must get the terms right. Mr. Lude-mann never said he is a depositor in a savings and loan association.

Mr. Grimes: I mean in advertising savings accounts.

The Witness: That account is not a deposit but a share

Q. Being a shareholder he must await liquidation?

A. If withdrawals are not honored after a certain period I think there is a right in the supervisory authorities to take possession. Of course, as a shareholder he also participates in profits and to some extent the return may be [fol. 410] greater in the form of dividends in a savings and loan association.

Q. We will get to that later. I am speaking now of withdrawals. State savings and loan associations are under your jurisdiction?

A. No.

Q. Just savings banks?

A. And trust departments of commercial banks and licensed cashers of checks.

Q. But State savings and loan associations are under the jurisdiction of the Banking Department?

A. Yes.

Q. You are generally familiar with them?

A. Not fully familiar with all accounts, I mean I know the general concept.

Q. Are State savings banks subject to the insurance fund of any sort?

A. This is State savings banks?

Q. State savings banks, yes.

A. All of the mutual savings banks in New York State are members of the Federal Deposit Insurance Corporation.

Q. In short terms, what does that mean?

A. That means an insurance through a corporation set up by the Government which would undertake to pay in cash

and subrogate itself for now, presently, to the extent of \$10,000 for any one depositor.

Q. For any one depositor? In other words, it really comes down to this that if a State savings bank is unable to pay on demand after say, a period of 60 days a depositor's demand for his money then immediately afterward the Federal Deposit Insurance Corporation must pay by the terms of the insurance policy?

A. That is roughly correct. I do not know whether there is a slight time interval.

[fol. 411] Q. Is the situation the same with regard to a person who has a savings account in a savings and loan association?

A. A savings and loan association, if they have insurance, are members of the Federal Savings & Loan Insurance Corporation.

Q. Most of them are, are they not?

A. I would say the greater portion of State associations are, and of course, all Federal Savings & Loan Associations must be.

Q. The end result and the answer is, yes, most of them are.

A. If you embrace both, yes.

Q. What is the deposit insurance arrangement where a savings and loan association—what happens on failure to meet obligations on demand?

A. I will say I do not know what the present status of that is. I know they are covered up to \$10,000; I know there was some optional methods of payment, some immediately and part over a deferred period, I think the power was recently.

Q. Some immediately?

A. That sounds right as to my recollection of the statute, when they raised the limit to \$10,000. I am not familiar with that amendment.

Q. And the balance over a period of years?

A. My recollection of the old was ten percent immediately and the balance equally over a period of three years.

Q. That comes into being, that is, the obligation of the insurance company only can be proved if the savings and loan association is insolvent, is that not correct?

A. That I don't know.

Q. Will you challenge the statement if it were decided that a savings and loan association was not insolvent in a [fol. 412] bankruptcy sense it might be in a period of liquidation for a period of some ten or twenty years before a depositor got all of his money?

A. Do you mean in that State or Federal savings and loan?

Q. State and Federal savings and loan.

A. Well, I would say,—I mean I am not competent, I think to answer fully. I think it is conceivable, but not likely.

Q. Is that not conceivable?

A. Could possibly be, but I do not think that result would be permitted to work out by the Supervisory Agency remaining passive that long.

Q. So far as you know that could happen?

A. It could. I could not absolutely say it could not.

The Court: Could I interrupt your train of thought by asking a question that I think belongs in here?

Mr. Grimes: Certainly you may.

By the Court:

Q. With respect to the insurance on the accounts in savings banks you said that all savings banks belong to this **Federal Deposit Insurance Association**.

A. Corporation, yes.

Q. Do they pay a premium like any other insured person?

A. They pay a premium.

Q. Now, then, to whom do they look for the funds, depositors look for the funds that insure their accounts? My question means, do they look to some Federal Deposit Insurance Company, or do they look to the United States Government?

A. The Federal Deposit Insurance Corporation is a corporation set up by the United States Government, and [fol. 413] it has in its assets the accumulation of these premiums that they have taken from banks over this period of years. I believe also, it has a right to call on the Treasury to borrow money in case the assets they have

ould be insufficient at a particular point. I do not think—
mean assuming they would exhaust all their own assets
and all borrowing power, that the Government itself is
under obligation to make good any shortage, or come to the
rescue, although conceivably it might as a matter of policy.

Q. You went over one very important part of my in-
quiry with rather a potential attitude. When the avail-
able funds of the Federal Deposit Insurance Corporation
are exhausted do you know, as a matter of law, from your
experience, does the Corporation then as a matter of right,
call on the Treasurer for more money?

A. I think as a matter of right they can borrow up to a
certain amount, that is, their own capital, from the
Treasury.

Q. The next question is, they have now exhausted their
borrowing powers, and there are still unpaid depositors,
do you happen to know where those people are paid from,
from what source, if they are paid?

A. I don't think they have any further source to look to
from the Federal Government. Of course, each time the
Federal Deposit Insurance Corporation pays out on a de-
positors' claim it is subrogated for his share of the assets
of that particular banking institution.

Q. You do not know?

A. I believe there is no further claim.

Q. So there could come a time in your understanding
[fol. 414] under the Legislation as we now have it, that
the savings bank depositor would not receive his deposit?

A. That is right. It could be a circumstance wherein
he would not be protected by Federal Deposit Insurance.

Q. There is quite an understanding to the contrary, that
is the reason I asked you about it. Now I want to ask you
about the savings and loan association. Those share-
holders are insured, are they not?

A. Yes.

Q. They are insured by the association itself, National
association?

A. There is another corporation called the Federal Sav-
ings Insurance & Loan Corporation.

Q. Is that a group that insures shareholders?

A. That is correct.

Q. Do they pay a premium?

A. That is right. The Association pays a premium to the Insurance Corporation.

Q. Does that association have available funds?

A. Insuring corporation?

Q. Insuring corporation.

A. They have accumulation of their premiums. Initially some capital was also put in by the Government; I am not a hundred percent sure whether that has been returned to the Government. I think they may have some mandatory call for borrowing on the Treasury, the same as the F. D. I. C.

Q. That answers that. But now I want to ask you the same question I asked you with respect to the other. When the funds of that Insurance group is exhausted, has it as matter of other right, the right to go any place and ask for more money?

A. Not that I know of. I think it is in the same position as the Federal Deposit Insurance Corporation, it has [fol. 415] to call for borrowed money to a certain extent, but no further call for the Government to make good any deficit it may have.

Q. Your answer would be the same when I say there could come a contingency where shareholders would not get the full amount of money they put in?

A. Yes, the same answer.

Q. With respect to the available funds in these two insurance corporations, do you happen to know, is there a larger fund available for savings depositors or a larger fund available for savings and loan associations, taking it in ratio? I do not know which there are the greater number of? Would you say there are more savings deposits than there are shares?

A. I cannot answer the question. There are more depositors' accounts insured than there are shares in a savings and loan insured, but I do not know the relative position of assets of the Federal Deposit Insurance Corporation vs. the Insuring Corporation against the Federal Savings & Loan Corporation in insured shares, I don't know which is the better ratio.

Q. I wonder if you could answer this question in one.

Assuming I asked you the same question with respect to National banks and their deposits, which they have received on which the law permits them to pay interest, you have called a passbook account?

A. Yes. They are in identical position as are the savings account of the savings banks, because they are both members of the Federal Deposit Insurance Corporation and subject to the same insurance and same assets.

[fol. 416] By Mr. Grimes:

Q. I just want to ask you about one more feature, in the insurance feature between the Federal Deposit Insurance Corporation which insures, as you said, the National banks and savings banks and insurance for savings and loan associations. It is true, is it not, that in connection with the latter insurance, that is the savings and loan associations, during a period of liquidation no interest is paid to shareholders?

A. I don't know. I am sorry.

Q. Will you accept my statement?

A. I would not challenge it.

Q. Whereas it is just the opposite with a commercial bank or savings banks, is that not true?

A. Well, I mean it is really academic, because you have suggested before in a commercial bank and savings bank—you have suggested before, that in the case of commercial and savings bank they would make immediate payment on its insurance when the institution closed. I do not think there is any provision in law, but I would not challenge it if you said there was. There would not be any interest to accrue.

Q. There are some differences are there not, of an important nature between a savings bank and savings and loan association. You mentioned investment policy this morning. Will you state what is the important difference?

A. You mean so far as investment powers are concerned, savings banks as against savings and loan associations?

Q. Yes.

A. Savings banks have less broad powers of investment; they are limited to 65 percent of their assets in mortgage [fol. 417] loans on real estate, resulting from a mortgage

loan, if they happen to have any, although an insured F. H. A. mortgage or the insured portion of the Veterans' loan do not come within that limit. In the case of a savings and loan association there is no limit on the amount of assets by statute that can be put in mortgages, the savings and loan association- have broader borrowing powers than savings banks do. Savings banks in New York are being limited to borrowing only for the purpose of repaying depositors. I think that answers the main ones.

By the Court:

Q. Is there a difference on an individual mortgage, while you are on the subject?

A. Yes. In the case of New York State Savings & Loan Association the general statute is they can lend to a member up to 80 percent of the appraised value, I think in the Federal Savings & Loan Association that is 75 percent of the appraised value, and that can be regardless of whether the property is new or old. In savings banks the general limit on the ratio of loan to appraisal is $66\frac{2}{3}$ percent, except with respect to owner occupied new construction; on construction within two years the statute is phrased, on single family, where they can loan up to 80 on the first \$10,000 and 50 percent on excess over that.

The Court: I am wondering if an error was made in the beginning of that answer?

By Mr. Grimes:

Q. Which type of institution—I am still talking about savings and loan associations and savings bank, New York [fol. 418] State variety, pay the higher return to the depositor or investor?

A. The savings and loan association over the years has paid a somewhat higher return to its shareholders than have savings banks paid to their depositors. I consider I finished the answer, unless there is something more.

Q. Is there a present average return paid persons, we will call them depositors, at the moment?

The Court: I would rather you stick to the terminology shareholder and depositor.

Q. Shareholder and depositor.

The Court: Let us keep the distinction. They make it
so let us keep it.

Q. Don't you know of your own knowledge, without recourse to books—withdrawn. What at the present time on the average do savings and loan associations pay their shareholders, if not average, give a range, please.

A. Roughly about two and a quarter on the average, all classes of shares considered.

Q. Is that dollars or percent?

A. Percent annually in terms of annual rate.

Q. And savings banks?

A. Substantially all are paying at the two percent rate.

Q. A number of savings and loan associations advertise a considerably higher return to their shareholders, do they not?

A. They indicate a possibility of getting it, I do not know as they advertise that they will pay it as to the future.

Q. You see ads. suggesting at least there will be a three [fol. 419] percent return?

A. I have seen ads. saying the current rate is three percent.

Q. Others saying the current rate is three and one-half percent?

A. I recall none of any New York association, Federal or State that I have seen, in recent years.

Q. The fact is, is it not, that savings and loan associations all over the United States advertise for investment in their shares in the New York area; that is true, is it not?

A. That is right.

Q. California Savings & Loan Associations advertise in the New York papers, urging New Yorkers to invest out there?

A. I don't know whether they advertise in New York papers. They advertise in trade journals that circulate in New York like the American Banker.

Q. You have seen such ads?

A. Yes.

Q. Illinois Savings & Loan Association?

A. Do not hold me specifically to a State. I have seen

them all, outside States; I don't know whether I have seen Illinois or not.

Q. You have seen them from all over the country?

A. From various States throughout the country.

Q. Advertising for New York money to be invested?

A. I don't know whether they are advertising for New York money or not. I mean they are advertising in papers that circulate in New York.

Q. What do you think the purpose is?

A. I presume it is to offer to the country by and large their investments.

Q. Don't you think it is, when they advertise here?

A. That is right.

Q. You don't have any doubt about it?

A. I am not suggesting there is no appeal to New [fol. 420] York. I did not want to say it was solely for New York money.

Q. You mean somebody outside of New York might read a New York ad?

A. Papers circulate. I mean the American Banker circulates all over the country. That is the ones you see this type of advertising most frequently in.

Q. You see it in New York papers?

A. Yes, sometimes in the Times, Tribune, but more often in the form of some individual advertisement on the availability of shares.

Q. Are savings and loan associations obliged to pay any income tax, State or Federal?

A. Federal savings and loan or both?

Q. Break it down any way.

A. Neither one is, to answer it.

Q. There is no point in making a distinction?

A. Right.

Q. Are they required to pay any income taxes at all?

A. Neither State franchise or Federal income.

By the Court:

Q. State franchise or Federal income? How about State income?

A. No State income, either.

By Mr. Grimes:

Q. How about State savings banks, are they obliged to pay Federal or State income taxes?

A. Not income taxes, but they pay State franchise tax.

Q. Is that a serious item?

A. It is more serious to them than is the franchise tax on commercial banks, because they have a minimum franchise tax.

[fol. 421] Q. What is it?

A. Base four and a half percent of income, dividends paid to depositors, allowing to be deducted a minimum tax of four percent on amount of dividends paid.

Q. Do you know what that averages a year in the case of savings banks, what percentage of its profits, on an average?

A. They run somewhere around .6, that is of their liabilities. If you will let me refer, I can tell you, but if not, I cannot tell you.

The Court: That is the first time we have had the word, profits used in connection with savings banks. Does a savings bank have profits?

The Witness: It has profits in the sense if it sells an investment for more than it bought it has profits so it is on net income, net profit. The term is used synonymously.

Q. Is that the only sense in which a savings bank makes profit, by way of capital gain?

A. Conceivably they might sell banking houses for more than they buy it, or for furniture and fixtures when as a practical matter the only assets they buy and sell would be investment securities.

Q. Do they get any income on their investment?

A. They get income on their investment.

Q. Sometimes does that income exceed the dividends paid?

A. Sometimes does it exceed it?

Q. Yes.

A. It generally exceeds it.

Q. It exceeds both the dividend paid and the total annual expense on occasion, does it not?

A. Generally.

Q. What is the difference?

A. The difference is net income not distributed, or [fol. 422] profit. If you will define accounting terms in which they are used I will answer them. So many people use them synonymously.

Q. You said you are a C. P. A.?

A. Yes.

Q. You know what profit is, in the general sense?

A. I have seen it used both ways.

Q. Are you suggesting some different term other than profit should be applied in the case of a savings bank to that between total annual income and total annual expenditure by way of dividends?

A. The usual term is net income.

Q. That is also profit?

A. Would include both earnings and profit.

Q. As a matter of fact most savings banks, defining the term that way, make an annual profit?

A. They have an excess of earnings and profit over expense, over dividends paid which, if you want to call that net profit they make a net profit.

Q. What would you call it?

A. I would call it net income period.

Q. On that net income they pay no State income tax; that is correct?

A. The income tax, yes, that is the ordinary measure that they pay income taxes against.

Q. Do they pay any State income taxes?

A. Franchise tax—excuse me, I am sorry.

Q. Do they pay any State income tax?

A. I mean, is there such a thing as State income tax from a corporation, or is it all franchise tax, or is an income tax paid?

Q. Let me ask you.

A. You are confusing me, because ordinarily the tax paid by a New York banking corporation in New York State is a franchise tax. The ordinary measure is based on [fol. 423] net income or net profit, as you want to phrase it. There are certain minimum taxes, minimum taxes in the case of savings banks being much more severe than the minimum tax in the case of stock banks.

Q. You are speaking of New York State?

A. I am speaking of the New York State franchise tax, yes.

Q. You said that amounts to about six percent per year, is that right, roughly?

A. It is four and one-half percent of net income, ordinary tax. If two percent of the amount of dividends distributed would exceed it, they have to pay that as income tax. We will assume they earn something like three percent after expense, and pay out two, that would leave them one percent to pay four and one-half percent tax on.

Q. Does a New York State savings bank pay any Federal tax?

A. Not at this point they do not.

Q. Do National banks?

A. I believe they do.

Q. You know they do?

A. I believe they do. I never saw one pay, but I believe they do.

Q. You know they are taxed on the same basis as a New York corporation?

A. That is right, same as State banks.

Q. You know what that amounts to, tax on the ordinary corporation?

A. The last I heard it was 38 percent of net profits, I believe, my best recollection. They raised it in the last half of last year. I think it was 45 percent for that particular period.

Q. It is now 45, plus excess profit tax, is that not correct?

A. That is correct.

Q. A commercial bank, National bank that is, which [fol. 424] makes considerable profit, might pay as much as 75, 77 percent?

A. I do not know what the probabilities of a National bank or commercial bank are of running into the excess profit tax. I am not too sure it is that easy.

Q. You would not be prepared to challenge my statement if it earned a sufficient amount it might pay a tax as high as 77 percent?

A. I do not challenge it, although my own opinion would be it would not run that high.

Q. It probably would not go that high?

A. No, it would not go much over the tax rate in my opinion.

Q. New York banks are obliged to pay a New York State income tax?

A. No.

Q. Franchise tax?

A. Franchise tax.

Q. Corporation?

A. Four and one-half percent of net income or net profits, whichever you want to use, a rather low minimum rate as minimum tax computed against capital. The point I am making is, the minimum tax is much less severe in the case of National banks and State banks than it is in the case of savings banks, although I think if you consult the records for these things you would find savings banks are paying a greater franchise tax in relation to their assets than are commercial banks in New York State.

Q. Something like one percent greater?

A. No, I think it goes many times greater because on a two percent rate of dividend so many of the savings banks are paying on a minimum basis; I mean that is available in the Tax Department reports, I don't know them off-hand. I have seen them.

Q. You said you had figures there. Will you tell us?

[fol. 425] A. You want to know the savings bank tax?

Q. Yes.

A. O. K. I will try to get it. I must apologize. We consolidated it in this book with other expense of operation, so I do not have it before me. That is a mis-recollection on my part. I am sorry.

Q. Can you give us the New York State rate?

A. Rate on what?

Q. Tax.

A. Franchise tax?

Q. Yes.

A. Four and one-half percent of net income, with dividends being allowed to be deducted as expense in case of mutual savings banks, minimum franchise tax at the rate

of two percent on amount of dividends paid; commercial banks, same general rate, four and one-half percent, of net income minimum I believe, computed against the amount of capital stock at a fairly low rate. I do not know the rate.

Q. Do you suggest that makes a good deal of difference between the tax paid by a State savings bank, mutual as you call it, and a National bank?

A. I suggest that the amount of tax in relation to the amount of assets collected by New York State as a franchise tax is considerably greater in the case of mutual savings banks than in the case of commercial banks, including National banks.

Q. In the case of the average bank of the same size, National bank, same size, or savings bank, same size, each making about the same profit, would not they pay approximately the same tax in New York State by way of franchise tax?

A. The difference of course is in the case of a mutual savings bank, the profit goes in effect to the depositors, [fol. 426] so that the amount is against the whole liability structure. In the case of a stock bank your profit goes down as against the stock, so that if you make one percent net profit over all, you come with a ten percent rate, if you have one of capital to ten of deposits. Ten percent.

The Court: Do you have any objection or motion to strike out?

Mr. Grimes: No.

The Witness: What I am trying to say is assuming you have a stock bank whose assets are supported by ten dollars of deposit and one dollar of capital, then if you make a net income equivalent to one percent of your assets that is a profit percentage wise in terms of capital, by the extent of the ratio of the deposits to the capital, or, if you made one percent over all on assets that would be the equivalent of ten percent profit to stockholders. In a savings bank you have no stock, so that if you have one percent profit on assets it is one percent profit in terms of owning depositors. Now, if you have a deposit growth in a savings bank, and choose to retain some portion of the earnings to margin off with surplus the deposit gain

in order to give you a secure asset position, that falls subject to the tax; in other words, to save one percent undistributed you get a tax rate against it, say one percent to stockholders it would only have to pay one-tenth of one percent earned on the structure as a whole.

[fol. 427] Q. Could you say in simple language what would the average New York State savings banks pay per year as contrasted with a National bank?

A. I cannot say, the figures are in the Tax Department report.

Q. It starts with four and a half per cent?

A. That is right.

Q. Each pays some comparatively small amount in addition?

A. No, the savings bank does not pay a comparatively small amount, not in addition, the alternative of the minimum tax is more costly to the savings bank, so that whenever the franchise tax falls on a minimum position the savings bank is comparatively less favorable.

Q. You don't mean to suggest a savings bank pays a basic rate of four and one-half percent plus something else?

A. No, I said it was alternative.

Q. Alternative tax was if you paid four and a half percent of something else?

A. On some lesser amount as a minimum.

Q. What is the maximum?

A. Four and one-half percent.

Q. So that is all it paid?

A. Or if the minimum would exceed it it would be the minimum.

Q. I mean, under a combination of figures, it is easy for the minimum to be close to the tax? The maximum is four and a half?

A. The maximum might be the minimum.

Q. What is the highest amount it could be in a year?

A. Whichever is greater, normal tax rate of four and a half percent on net income or the minimum tax of two percent on the amount of dividends paid.

[fol. 428] Q. Can you say there is any maximum on the tax in New York law?

A. It would be the higher of those two computations.

Q. So you have a choice?

A. They do not have their choice. Whichever produces the higher figure is the tax charged.

Q. That means a handicap to a national bank of 45 percent plus the excess profits tax?

A. I would have no earning position to express it. I would not challenge your statement if you said you thought the other was the greater tax burden.

Q. 45 percent plus something else is generally greater than four and a half percent?

The Court: It would depend on what the principal was.

Q. Depends on earnings, does it not?

A. Depends on earnings, yes.

Q. Both types of income tax depend on the acquisition of interest?

A. The New York tax is not an income tax, it is a franchise tax.

Q. It is based on income?

A. That is one of the measures.

Q. The other measure is the declaration of dividends?

A. The other measure is the minimum amount.

Q. Will you put down \$2,500,000 representing profits for a type of financial institution after all expenses are paid?

Mr. Rollins: I have made no objection. Unless there be any question about it, I feel this is collateral to the issue, tending to prolong the trial. I cannot see the relevancy [fol. 429] and I object to this line of questioning.

The Court: I think it is a debatable question whether or not it is relevant, but I think it ought to be taken. I should not want to risk the chance of refusing to allow the defendant to develop this comparative tax position of the two forms of institutions.

Q. Let us take two million.

A. No. I just mean that does not give odd figures to work with.

Q. Under that will you put two million dollars paid in dividends and subtract the second figure from the first?

A. I am using two million five hundred thousand.

Q. That would represent earnings?

A. That is our net income or net profit base.

Q. Net earnings, same thing. Will you figure up, assuming that is a State savings bank paying a State franchise tax.

A. Yes.

Q. Will you figure out both methods and state to the Court what the tax would be? What tax would be payable in New York on a four and a half percent basis?

A. That computation would show \$22,500.

Q. In making that computation you deduct two million dividend paid, a difference of \$500,000, multiplying four and a half, which makes \$22,500?

A. That is the computation on the basis of income, yes.

Q. There is an alternative basis, is there not?

A. Yes.

Q. Dividends had been declared and paid?

A. No. Wait a minute. You have said something with [fol. 430] which I do not agree. You are talking now about a mutual savings bank.

Q. Yes.

A. I say the minimum tax was two percent, amount of dividends paid. The example you gave me you had two million dividends paid. Two percent of that would be \$40,000, so under these hypothetical set of figures the savings bank owed the State \$40,000.

Q. I asked you to do it both ways, four and a half percent of net earnings, that is one method; that gave you \$22,500?

A. Right-o.

Q. Then having paid in dividends two million, it takes two percent of that, does it not, and that would be \$40,000?

A. Right.

Q. It must pay the maximum, is that correct?

A. Must pay the higher.

Q. Higher of the two?

A. Right.

Q. The higher of the two is \$40,000 in that case. Now will you take the same two million five hundred thousand of earnings after expense for a National bank, with two million dividends paid, two million, call that interest paid, that leaves you a net earning of \$500,000 does it not?

A. Right-o.

Q. Taking the minimum Federal income tax, it would be 45 percent?

A. Don't you take your State tax first?

Q. Take the State tax first then, if you wish to do so, and deduct it, will you?

A. Yes.

Q. What does that leave?

A. \$437,500 subject to Federal income tax.

Q. Use the minimum income tax, forget the excess profit tax?

A. 45 percent.

Q. Will you make the computation?

A. Subject to mathematical error it is \$196,875 tax.

Q. That is Federal?

A. That is Federal.

[fol. 431] Q. Will you add the Federal to the State, please, and give us the total?

A. Under this set of figures that produces a total tax of \$219,375.

Q. Against \$40,000 for a savings bank?

A. Under those figures.

Q. Hand those figures to the Court.

A. O. K.

The Court: Let us mark this in evidence.

(Paper received in evidence and marked Defendant's Exhibit V.)

The Witness: Now I will ask, let us assume——

Q. You are not permitted to ask me anything.

A. All right. Excuse me.

The Court: We have a question and the question is answered. The witness wants to make a correction in his answer, or amplification. State what you would like to do.

The Witness: What I would like to do is to say this: my answer was under some circumstances the tax would run higher in one case as against the other. Counsel here has given me a comparison set of circumstances under which the combined Federal income tax and State franchise will be greater than the State franchise tax for savings

banks. I could present another set of figures in which the result would be the opposite.

The Court: All right. That is a good enough state-[fol. 432] ment, and unless there is some objection I will let that answer stand.

Mr. Grimes: I have no objection.

The Court: Let the answer stand.

By Mr. Grimes:

Q. Are savings banks in competition with savings and loan associations in New York State?

A. The trouble with the question frankly is, what do you mean by in competition?

Q. In other words, is a dollar in someone's pocket likely to go into either, or do they battle against each other to get the same dollar from the same class of persons? There are many other forms where the same dollar might go, E bonds, investment trust, stocks. Are savings banks in competition with savings and loan associations? Are you unable to answer that simple question?

A. (No answer.)

Q. In other words, is a dollar in someone's pocket likely to go into either or do they battle against each other to get the same dollar from the same class of persons? There are many other forms where the same dollar might go, E bonds, investment trusts, stocks. Are savings banks in competition with savings and loan associations? Are you unable to answer that simple question?

A. What I want to know, what is the implication in competition?

The Court: All right. Stop there. He wants to know what is the implication of the phrase, in competition.

Mr. Grimes: I would like to ask him whether he can answer the question I asked. He can or he cannot, [fol. 433] one or the other.

The Witness: In the form, I don't know whether I can answer the question because I don't know what you mean.

Q. My question was, are savings banks in competition with savings and loan associations? Can you answer that question or are you unable to do so?

A. Do I have to answer that narrowly?

The Court: No. You can say unless something is defined you cannot answer it.

The Witness: Well, I mean I can answer it responsively, but not yes or no.

The Court: If you cannot answer it yes or no, just say so. He asked you can you answer that, whether he considers it a simple question.

The Witness: I do not consider it simple so I cannot answer yes or no to what I think would be our mutual satisfaction.

Q. What do you mean by mutual satisfaction? Can you answer the question at all?

The Court: Can he answer the question at all?

The Witness: Yes, I can answer the question.

The Court: He said he could answer the question, but he said he could not answer it categorically yes or no or in a short answer. He said that before.

Q. Let me ask you this. Are savings banks, New York State variety, in competition with National banks? [fol. 434] Can you answer that question?

A. Same answer as the other.

Q. Do you know any bank in New York that is in competition with any other bank?

A. Banks that are in the same line of business, same service, vie with each other to sell that particular service to the public that they think they might be interested in.

Q. Let me see if I understand you. One savings bank in New York State, City, say, might be in competition with another, is that right?

A. It might be, although by and large they are pretty well spaced.

Q. In other words, it might not?

A. That is right.

Q. Are you unable to state for instance, whether or not the Emigrant Savings Bank, New York City, is in competition with the East River Savings Bank? Have you formed an opinion on that subject?

A. In certain aspects, yes, other aspects, no.

Q. Is that one situation in which one savings bank might be in competition with another in the same community?

A. By reason of proximity, yes.

Q. By the same token it might not be?

A. Yes.

Q. You think one possibility or the other? You are not sure whether two savings banks in New York City are in competition with each other, is that correct?

A. No. They are in competition to a certain extent.

Q. When it comes to contesting or trying to get people's money in the institution would you say those two banks are in competition, or do you have doubt about it?

A. Competition can take the form of trying to sell [fol. 435] new customers, can take the form of trying to take customers away from another institution.

Q. Confining yourself to the question I asked.

A. Of new customers?

Q. No, competition, competing for people's money or deposits, are you able to form an opinion as to whether say the Emigrant might be in competition with the East River Savings Bank in New York?

A. Yes, it might be.

The Court: Why did you put it, might be? Is?

Mr. Grimes: He says it might be or might not be. I am getting to the point where he might venture an opinion.

Q. Can you state positively those two banks are in competition with each other for people's money, for deposit purposes?

A. They are in some competition, yes.

Q. Can you characterize the degree of that competition? Keen?

A. Not destructive, not trivial.

By the Court:

Q. Let me understand. Do you mean when you say in competition each institution is actively engaged in trying to acquire these deposits, or do you mean from the very nature of the institution and its name, located where it is, and in lower Manhattan, or just by reason of its presence and proximity of one to the other and the proximity of the two

to a large population of prospective depositors they are in competition? Which way do you mean it? In [fol. 436] other words, activity on the part of the institution, one trying to vie with the other?

Mr. Grimes: I meant the very nature of the business they are in, whether he is able to state whether they are in competition.

The Court: Without regard to any activity at all, just the location of the buildings, centered where they are with a large potential population of depositors.

The Witness: With that question I will answer yes.

The Court: On location he answers yes, but with respect to the activity, public relations department with each one.

Mr. Grimes: I did not include that.

The Court: That would be included in the question, unless you eliminate it, I would say, are they in competition with one another?

Mr. Grimes: Total field, that is what I meant. It could include, yes, I grant that.

The Court: He says now the location of the two institutions practically drawing from the same potential depositors in lower Manhattan, that naturally places them in competition one with the other. Have I over stated that?

The Witness: No.

By Mr. Grimes:

Q. So we have those two institutions in competition?

A. Yes.

Q. Will you say savings banks are in competition with savings and loan associations, if they are located in the [fol. 437] same general locality?

A. Yes, sir.

Q. They both compete for people's surplus money, do they not, to put in short blunt terms?

A. Yes.

Q. Commercial banks do likewise, do they not?

A. Yes.

Q. Is it not a fact commercial banks, State or Federal, and savings banks and savings and loan associations are

all in competition for people's surplus money, is that not true?

A. They are each offering their services, competing for the public's acceptance; if that is what you mean by competition, yes.

Q. They all advertise, do they not?

A. I think almost universally so.

Q. No doubt about that.

A. I could name one savings bank did not advertise.

Q. But practically?

A. I said universally, almost universally so.

Q. For instance, you know what the annual budget was in 1949 for New York State savings banks association for advertising purposes?

A. I do not.

Q. If I told you it was \$350,000 you would not be prepared to challenge that, would you?

A. Not offhand, no, sir.

Q. Would you be prepared to say millions of dollars are spent in the New York area by financial institutions for advertising purposes, directed specifically to obtaining the surplus money people have by way of deposits, investments or whatever you want to call them?

A. Well, I don't know the dollar figure, and, of course, a lot of advertising competes for other services than for the [fol. 438] deposit dollar; I would not challenge your statement, if you believe it is correct, in fact, it does not sound as if it would be impossible.

Q. Would you say at least a million dollars was spent for advertising in your opinion?

A. I am not saying at all, but I am not challenging yours.

Q. Savings deposits, in the general sense of the word, form a very important part of the total reserve of National banks, do they not? I believe your figures outside of New York City showed about a third, is that correct?

A. I would say in National banks about 15 percent of their total deposits are in time deposits in the form of passbook accounts; that is for National banks in New York State.

Q. That includes very large National banks of New York City, does it not?

A. That is right, and one of those supplies quite a bit of that figure, too.

Q. What are the figures you gave for National banks outside of New York City?

A. I did not give any for National banks. That was for State commercial banks.

Q. Do you have any figures?

A. I do not have a division in National banks between New York City and outside of New York City.

Q. Will you say that savings deposits for banks in New York State, National banks in New York State, outside of New York City, have in recent years run over fifty percent of their total reserves?

A. I would not believe it impossible. I have no way of knowing whether that is correct. It could well be.

Q. It could well be that high?

A. Yes.

Q. Assuming that to be the case, assuming it is over [fol. 439] 40, sometimes running beyond 50 percent, it is a fact, is it not, that savings deposits are very important to National banks, at least those outside of New York City?

A. You are making me use the term, or you are talking in terms of savings deposits.

The Court: You have to take that out of the question because that is the theory of their case.

Q. Is there any other term you suggest we use?

The Court: Passbook.

The Witness: Passbook accounts.

Q. Passbook accounts form a very important part of the total reserves of National banks outside of New York City?

A. I believe that is correct.

Q. You have no reason to question that at all?

A. Of course, they form part of the liabilities.

Q. Is their function to loan money?

A. Right.

Q. On which they hope at least to take in more income than their outgo?

A. Yes.

Q. The extent of their ability to loan money to industry or other groups is in direct ratio to their passbook deposits?

A. It is in direct ratio to the total deposits they have.

Q. Correspondingly passbook accounts are one element?

A. As one element outside of New York City.

Q. Do you know of your own knowledge, observation or experience as a person who has been in banking many, many years, that National banks located in the area [fol. 440] of Nassau County are in competition with savings banks in New York City?

The Court: For deposits.

The Witness: I would presume in the sense that many of the people who live in Nassau County work or go in to New York City, and hence might have an available opportunity to use New York City institutions, but you could say they were in competition in that respect.

Q. You do not have any doubt many deposits in New York City savings banks come from Nassau?

A. I have no data on it, I have no reason to believe people in Nassau County do not deposit in savings banks in New York City, Queens County.

Q. You know the number of savings and loan associations in Nassau County?

A. I do not. Most of them I believe are Federal.

Q. Quite a few are?

A. Exactly, I mean I would say there are probably twenty, anyhow. I do not know how far I may be off in that.

Q. When it comes to competition for people's deposits would you say National banks in Nassau County are in competition with savings and loan associations in Nassau County, whether those be State or Federal?

A. I would say they are each making an appeal for public money. Whether or not—

Q. Advertising?

A. Whether they are making the same appeal I mean, I do not want to hold that inherent in the question.

Q. There is no question in your mind that each is appealing for people's money?

A. On the basis of the service they have to offer [fol. 441] respectively, I mean in the same sense.

The Court: I think that is clear. We will take your testimony as a whole. One is a shareholder and the other is a depositor.

The Witness: Right.

The Court: They are both looking for money that is lying around?

The Witness: Right.

By Mr. Grimes:

Q. Would you say that competition is substantial?

A. I am not in a position to put an adjective on it, or an adverb, whichever it is.

Q. You cannot say whether it is substantial or not?

A. No. I mean, I do not live in Nassau County, I do not have access to, you know, the local papers in Nassau County, so I do not know the degree.

Q. Is there, I believe I asked you this before, but I would like to inquire just a little bit further, are not Federal savings and loan associations throughout the State paying as high as three percent on their investments?

A. They have some forms of share whereas if they are continued for a sufficient number of years, and dividends you know, currently paid, rather maintained throughout that period would produce it, but if you mean on the other hand does the average share in a Federal savings and loan get three percent, my answer is, I don't think so.

Q. Some advertise they pay it?

A. They have a class of share known as, I think they use [fol. 442] bonus share or installment share whereby if you make payment over a great length of period they vote an additional dividend, and with the two percent base dividend, if that additional dividend is one, that would work out to three and some odd advertised, that might be produced assuming the current scale to be continued, but I do not know any in Nassau County. I have seen some of the New York City ones.

Q. Would you say that type advertising is likely to attract people's money into that type institution as distinguished from a savings bank or a National bank?

A. I don't know frankly, because it might lead them to inquire, but whether or not it would attract the money I am not sure.

By the Court:

Q. That is just personal observation?

A. Yes.

The Court: He is just making a personal observation. I do not think he could tell us the state of mind of other people.

Mr. Grimes: I am asking him about practice, if he knows.

The Witness: Actual practice I do not think that Federal savings and loan associations get much money of that class where that higher rate is applicable. The bulk of their money is in shares other than that form of share.

Q. Is that something over two percent?

A. At three percent, as you suggested.

Q. What form of share are you talking about?

A. In the Federal savings and loan to the best of my [fol. 443] knowledge there are basically three types of share so-called optional share or savings share on which an amount may be put in at the option of—

Q. What rate of interest is paid on that?

A. Two percent generally.

Mr. Rollins: May the witness answer?

The Witness: Two percent is what I have seen most frequently on that.

The Court: What is your next classification?

The Witness: There is a classification whereby you put in a lump sum and agree to leave it for a certain time, they will pay you a little bonus above it, a little extra higher dividend above the two percent. The one you spoke about whereby—

By the Court:

Q. Third class?

A. Third class.

Q. Is that the one which you have been telling us about? I believe it is the share whereby you agree to make payment in installments.

The Court: We have that.

Q. Do those distinctions appear in ads which you have seen, or is it not a fact that most ads advertise a flat three percent?

A. So far as I saw those in New York State my recollection is it indicates that special conditions attach to it.

Q. You think based on your many years in banking, and am I correct in recalling your testimony was that you are [fol. 444] presently in charge of savings banks in New York State as Deputy Supervisor?

A. That is correct, we are divided functionally, and that is one of the functions that come under my deputyship.

Q. You have been a deputy for fourteen years?

A. Ten of those years I have had savings banks.

Q. It has been your job to watch them?

A. Correct.

Q. And supervise, is that right?

A. Yes.

Q. You supervise passbook accounts, do you?

A. I have no preference. I am trying to use the term that is common to all and indisputably common to all.

Q. Savings banks have passbooks?

A. Yes.

Q. National banks use passbook accounts?

A. They use passbooks, yes.

Q. How about savings and loan associations?

A. They use a form of book to record a share transaction, too.

Q. State commercial banks use passbook accounts?

A. Yes.

Q. Each account pays interest, does it not, at the present time?

A. Pays interest.

Q. Or pays—

A. (Interrupting.) Interest or dividends.

Q. Pays something to the depositor?

A. That is right, interest or dividend.

Q. Interest, or what they call dividends.

A. I think we are referring to passbook accounts, are we not?

Q. A time deposit is a term considerably broader than passbook account?

A. Yes.

Q. Is there any substantial difference between these various types of passbook accounts from the standpoint of the banking institution and from the standpoint of [fol. 445] the person, a member of the public who uses that service?

A. Do you mean—

The Court: I think you would have to refine that question to something. A little too broad. The witness would have a very long answer to make to that.

Q. From the standpoint of the financial institution itself, and from a member of the public who has surplus funds and wishes to put them away some place and get a return on it, is there a substantial difference between a passbook account in a commercial bank and one in a savings bank?

A. There is some difference to the incident. It might be very important to the particular person.

Q. You make a real distinction between those types, do you?

A. I make this distinction, if you will permit me. I mean, in a savings bank you have a mutual institution, you have that almost as the sole source of raising funds, I mean they have club accounts which are minor on top of the passbook account, so that you have them devoted exclusively really to serving savings accounts in passbook form; that is their one big stock in trade day in and day out, that is really the only public funds they can attract in that form, and they have no other object, real one, than to keep the funds invested safely and to pay the maximum rate of distributable earnings that can be safely produced. In the commercial bank there is not a similar restriction around the assets to which the funds might be invested, there may or may not be the same continued interest in passbook accounts, and is the possible conflict of interest between stockholders as between paying the highest rate can be safely produced or a rate they think is necessary to hold that type of business, and you have your background of history and tradition what it means to

a person, what their representations mean in publications, who has been in business longest. That is the consideration. I do not know what you want in the way of an answer beyond that.

Q. You know commercial banks are permitted by law to keep savings deposits, do you not?

A. I know there is reference in the National statutes to savings deposits. I do not know whether there is direct permission or not.

Q. You do not have any occasion to challenge my statement.

A. I am not a lawyer. I would not challenge whether they have that power or not.

Q. They may do so?

A. I have not read that particular portion.

Q. Has it ever come to your attention that the Federal Government refers to them as savings deposits?

A. That is correct. I know there are definitions of savings deposits applicable to commercial banks, members of the Federal Reserve system.

Q. You recognize these documents here as public documents furnished by the Federal Reserve Bank, that is one of the Second District, do you not?

A. They look very familiar; the same thing we get, very familiar. I do not dispute it at all.

Q. You recognize these as authentic documents?

A. I would say so. I think they are.

The Court: Are you not asking the witness to go a little far there. He does not know whether they are [fol. 447] authentic or not. It is like things that were sent to him. He is stating you are handing him something Federal. If they are authentic copies promulgated by the proper department of the Federal Government, I shall receive them in evidence, whether this witness says they are right or how right.

Mr. Grimes: I offer them.

Mr. Rollins: I object. It is not under the—unless the documents have been filed with the Federal Registrar.

The Court: You can object to the competency.

Mr. Rollins: As hearsay.

The Court: If you want to say I object, I must sustain

the objection. You cannot put a report or regulation of that kind in evidence just by handing it to the Court, but counsel I have the utmost confidence could produce here a witness to make that competent, if he is required to do it.

Mr. Rollins: What is that intended to prove?

The Court: Mr. Grimes thinks these two public documents are important to his case. You both are trained lawyers. He should hand them to you and if you think they ought to be objected to on the ground of relevancy or materiality you should do it. If you think they should be objected to because they are not competent, the proper thing to do would be to confer with Mr. Grimes and find out the origin, and not just force counsel to bring someone here [fol. 448] from the Banking Department with the originals. That is the only difference. If the originals were here, provided they are relevant and material I would receive them in evidence.

Mr. Rollins: In the first place, they are incompetent, irrelevant and immaterial to the issues in this case, and secondly, they are attempting to establish an opinion expressed possibly on the main issues, whether the statute involved—

The Court: You do not have to go any further.

Mr. Rollins: Objected to on the ground they have not been published in the Federal Registry, therefore any regulation therein stated cannot be admissible in evidence.

The Court: All you have to say is, they are incompetent. I sustain it. You will have to come to some agreement yourselves. Nothing like that is competent when there is an objection.

Mr. Rollins: I will not challenge the veracity.

The Court: That will not do unless you say you object on the ground the paper, not being competent. I cannot take the printed copy when an original exists somewhere. Let him pass on to something else. The objection is sustained.

By Mr. Grimes:

Q. Showing you these documents, which I will ask to [fol. 449] have marked for identification at this point.

(Two papers marked Defendant's Exhibits W and X for identification.)

The Court: Hand them to the witness.

By Mr. Grimes:

Q. Will you state whether or not—let me see the two documents——

The Court: I think you are questioning the wrong man. He says he does not know anything about these Federal matters. You are going to call some Federal bank officials here. Why not leave it to them.

Mr. Grimes: He says he does recognize them and State banks were under supervision and they get these.

The Court: All he is doing is looking at the printing on the outside and he recognizes that.

By the Court:

Q. Is it a fact you are familiar or unfamiliar? I do not even know what these are, regulations of the Federal Banking Department?

A. These I presume are regulations of the Board of Governors of the Federal Reserve.

Q. Are you familiar with them?

A. I have seen them from time to time. You mean do I know they were properly created?

Q. Yes.

A. No.

The Court: That is an answer.

[fol. 450] By Mr. Grimes:

Q. Have you ever seen the passbook accounts of a National bank referred to in the National Banking Act or Federal Reserve Act, or in the rules and regulations or reports or bulletins of the Federal Reserve system or the Board of Governors thereof as anything other than savings deposits?

A. My best recollection is, wherever I have seen that kind of account described it has been in connection with the definition of savings or time deposits.

Q. My question is, have you ever seen any other word used to describe the same function?

A. Time deposit is the answer.

Q. Time deposit or savings deposit, is that right?

A. Yes.

Q. A time deposit includes a savings deposit, is that right?

A. Yes.

Q. When they meant savings deposit as distinguished from time, have you ever seen any words used other than savings deposits?

A. I don't recall.

Q. You are familiar with Section 258, subdivision 1, are you not?

A. Yes.

Mr. Rollins: New York State Banking Law?

The Court: Yes.

Mr. Grimes: Yes.

Q. Would you say a thrift account is the same as a savings account?

The Court: In what respect?

[fol. 451] Q. In the matter of terminology?

A. I would not say.

The Court: Just a minute, now. You would have to have that question directed to one or another group. If you are talking about from the point of view of a bank, that would be one thing. If you are talking about from the point of view of the public I do not think he can answer.

Mr. Grimes: I am talking about the statute, and these various words that are used.

The Court: He cannot interpret the statute. I am not going to permit him to do that.

Mr. Grimes: Difference between direct and cross examination?

The Court: Yes. Unless it is to challenge his statement on direct I do not think it would be proper to ask the witness to interpret the language of a statute. When you ask him whether there is a difference between those two terms of deposit accounts, you would have to refine that as to just

exactly what group it had application to. The witness could not very well answer. If you mean just his own personal view, I do not think we ought to take that. I have excluded that from those other witnesses.

Mr. Grimes: Very well.

By Mr. Grimes:

Q. In your observation in connection with your position you have visited many banks, have you not?

A. A considerable number.

[fol. 452] Q. You have knowledge as to whether or not banks are asked by the Treasury Department of the United States Government to participate in United States Savings bond drives?

A. Yes, they are asked to participate.

Q. Do they do so?

A. Yes.

Q. Do you know of a-y bank that refuses to do so?

A. I know of none.

Q. State banks as well as National banks have done so?

A. Yes.

Q. They are also asked, all banks, are they not, to display signs in connection with putting on a drive to sell United States savings bonds?

A. Signs, poster, yes, sir.

Q. You have seen a number of them, have you not?

A. Within banks?

Q. Yes.

A. I have seen a number, not too great a number.

Q. By the way, are you familiar with Federal Reserve forms?

A. Which form?

Q. Comptroller of the Currency rather, Comptroller of the Currency form say 21-29?

A. That is right, Federal Reserve form.

Q. Comptroller of the Currency, earn dividends, are you familiar with that form?

A. Not that form, because that is a National bank form, although I do not think it differs greatly from the ones used by New York State for commercial banks, except as to terminology, or from those used by the Federal Reserve

Bank, but that particular form I do not have reason to see, the Comptroller's form.

Q. Have you ever seen one?

A. I have never examined one, no.

[fol. 453] The Court: How much longer will you be with this gentleman? I thought we could finish with him.

Mr. Grimes: I expect to finish in just a few minutes.

Q. Do you recognize this document as a Treasury Department advertisement for savings banks?

A. I would assume it is that. It looks very familiar, I say, it looks like it, very familiar to me. I assume it is issued by the Treasury Department.

Mr. Grimes: I ask it be marked in evidence.

The Court: Mark it.

(Received in evidence and marked Defendant's Exhibit Y.)

Q. Have you, in the course of your official duties observed many such placards as Defendant's Exhibit Y in National banks?

A. I don't recall seeing any in National banks because I do not go into National banks.

Q. Have you seen them in State commercial banks?

A. I would not guarantee I did.

Q. You do not know whether you have or not?

A. No. About the only commercial bank I get in is the one I bank in. I don't recall seeing it there.

Q. Do you know whether those signs from any source, such signs are displayed in National banks?

A. I have no reason to dispute they are displayed in National banks, State commercial banks or savings banks.

[fol. 454] Q. Let me ask you this. You know National banks have a duty to sell bonds?

A. They are fiscal agents for the United States Treasury.

Q. You know that as an expert on banking?

A. I know that from my recollection generally of the banking laws.

Q. They were established in 1863?

A. I know.

Q. That is right?

A. That is correct.

Q. This is a regular function, to sell Government bonds, acting as fiscal agent of the United States Government?

A. Yes.

Q. You know National banks, or do you know, are paid a service fee for the redemption of the sale of savings bonds?

A. I know there is a fee paid and I assume it is similar to any institution, whatever it be, savings bank, commercial bank or National bank.

Q. When a National Bank advertises United States bonds, sells them, acts as fiscal agent in the sale or redemption and receives a fee for doing the same would you say they are using the word, savings, in connection with their banking business?

A. No.

Q. You would not? That is not a use of the word savings, in connection with the banking business of a National bank?

A. Those funds go to the United States Treasury, don't they?

Q. Are you giving your answer? You see the use of word savings, United States savings bonds?

A. Yes.

Q. A National bank displays that sign?

A. Yes.

Q. It sells savings bonds for the Federal Government?

A. And gets a fee.

Q. Redemption deals with the public. On that [fol. 455] basis do you say that is not a use of the word, savings in connection with a National bank business?

A. Not in their bank business.

Mr. Grimes: I do not have any further questions of this witness.

Q. Do you plan to remain in New York State service?

A. I have an offer from a Manhattan Savings Bank to become its vice-president and secretary. That I intend to accept as of tomorrow.

By Mr. Rollins:

Q. Do you want to add anything else to what you said?

A. No.

Q. By way of explanation or addition?

A. Not on that.

Q. What you testified on?

A. No.

Mineola, New York,
February 1, 1951

(Trial continued.)

The Court: Let us see where we were. We had called a witness out of order, had we not?

MOTION TO DISMISS COMPLAINT AND RULING THEREON

Mr. Grimes: If your Honor please, the witness of yesterday, Mr. Ludemann, having been called on the direct, I renew the motions previously made to dismiss.

The Court: I will make the same decision. Now we are on the defense and ready to proceed.

Mr. Grimes: Mr. Brumbach.

[fol. 456] RICHARD BRUMBACH, residing at 705 Lincoln Boulevard, Long Beach, New York, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. Mr. Brumbach, what is your occupation?

A. I am an instructor in the Psychology Department at Hofstra College.

Q. How long have you held that position?

A. Since September 1950.

Q. Is there also in that college what is known as the Psychological Workshop?

A. Yes, there is.

Q. What is your connection with the Psychological Workshop?

A. I am the Associate Director of the Psychological Workshop.

Q. Who is the Director?

A. Doctor Chappell.

Q. Who has testified here?

A. Yes.

Q. Now would you state briefly what your education has been.

A. In 1936 I took a B.S. in sociology from Columbia University, and in 1940 I got an M.A., Master's Degree, in sociology, at Columbia.

Q. What work have you done since that time, starting with 1936, if you worked during the period while you were studying for your Master's degree?

A. Well, from 1936 until 1940 I worked for the New York City Department of Public Welfare.

Q. What sort of work?

A. I was at one time a social investigator, and later I was a community relations interviewer. That is a job of meeting with various community groups that want to discuss the Department of Welfare regulations.

[fol. 457] Q. Go ahead, please.

A. From 1940 to 1945 I worked for the Community Service Society in New York City as a psychological case worker.

The Court: Is that a municipal organization?

The Witness: No, that is a private foundation.

A. (Cont'd) On that job I did case studies which were very intensive studies based on a small number of respondents, fifty to a hundred very intensive interviewing.

Q. Your field up to that time, at least, had been in the psychological field, is that correct?

A. Right.

Q. Proceed, please.

A. From 1945 until last September, 1950, I worked for Alfred Politz Research.

Q. What do they do?

A. They are a market research firm.

Q. What sort of work did you do there?

A. Well, my title there was field supervisor, which meant that I would work with a client in developing the problems that they wanted investigated, writing the questionnaire, testing the questionnaire out on a small number of re-

spondents before it was put into the field. I would work with the sampling department in deciding what the sample design was going to be, train the interviewers, I would be in charge of the analysis of the returns or results after the interviewing had been done and then would write the report.

Q. Does Politz do work for well-known concerns?

A. Yes, quite well known.

[fol. 458] Q. Could you name a few, please, and the type of work that Politz did for them.

A. One of our clients that I worked with was Socony Vacuum Oil Company. We did a number of jobs for them in reference to the type of gasoline and oil that motorists would buy, what sort of things they were looking for when they went into a station to buy oil, what factors influenced their decision to buy a particular brand of gasoline or a particular brand of oil. I worked on a survey for du Pont where we had observers in gasoline stations who would watch motorists when they came in to buy anti-freeze and would keep a record of everything that the motorist had done at that time—whether he had asked for the anti-freeze by brand, whether he knew what particular brand had gone into his car—

The Court: You can stop there. I think you have exhausted that subject now.

Q. You did other-like jobs for well-known concerns, is that right?

A. Yes.

Q. And these jobs, is it fair to say, involved knowledge, preference opinion and a wide variety of public attitudes in regard to a specific product or service; is that correct?

A. That's right. I also did surveys that had to do with the public's knowledge.

Q. Could you illustrate that type, please?

A. I worked on a survey for the Rolled Gold Platers Association, who wanted to find out how much knowledge the public had of terms that were used in the trade to describe gold-plated jewelry. There were several terms—gold-filled, gold-plated, rolled gold plate—and their desire in that [fol. 459] particular survey was to find out how much the public knew and understood of those particular terms.

Q. Would you state briefly what the work of the Psychological Workshop at Hofstra College is.

A. We are doing surveys in the market research field. Our work largely we think will be in the direction of studying methodology or developing new methods of doing surveys.

Q. With the idea of improving them?

A. That's right, yes.

Q. And you are constantly working on that subject?

A. That's right.

Q. Very briefly, please, has Hofstra College for some period of time been interested in that field? I refer to the survey field.

A. Yes, they have.

Q. Could you name a few of the notable surveys that have been done by Hofstra College?

The Court: Just the names of customers or clients, whatever you call them.

Q. And perhaps, if his Honor permits, just a very brief description.

A. They have done two—we have done—well, the workshop has done two rather large surveys for the National Broadcasting Company, both of them in reference to television. The first one was a comparison of television and nontelevision homes for several characteristics. The last one that was done was designed to study the effectiveness of various types of television advertising and the appeal of different television programs.

Q. Those surveys both involved public knowledge and public preference, is that correct?

A. Right.

[fol. 460] Q. You have been in court during the testimony of Doctor Chappell?

A. I have, yes.

Q. Did you work upon the Hofstra survey of certain banking terms, of which there has been much testimony in this case?

A. I did, yes.

Q. Did you have charge of a certain branch of that survey? When I say "have charge," I mean did you take over and do most of the work of a certain branch of that survey?

A. Yes. I worked with Doctor Chappell from the beginning in all aspects of the survey, but there were some parts of it in which I did more work than others.

Q. Specifically, on the calculation side, would you state to the court what you did in reference to that?

A. Yes. When the questionnaires were returned from the interviewers, I was in charge of seeing that they were accurately tabulated in order that we could get the final results of the 928 interviews that we had made.

Q. Did you do so? Did you make the tabulation?

A. Yes, I did.

Q. Was the tabulation accurate?

A. It was, yes.

Q. Do you have the tabulation sheets here?

A. They are on that blue folder.

Q. I show you a batch of papers and ask you whether those are the tabulation sheets which you worked up.

A. Yes, these are the tabulation sheets.

Q. Those comprise all of the final tabulation sheets, is that correct?

A. That is correct.

Q. Those tabulation sheets accurately set forth the results of the tabulation of the answers given on all of the questionnaires, is that correct?

A. That is correct.

[fol. 461] Mr. Grimes: I offer them in evidence, your Honor.

Mr. Rollins: If the Court please, I object to the receipt of these sheets in evidence, upon the ground they are incompetent, irrelevant and immaterial.

The Court: Make it the same objection.

Mr. Rollins: And particularly upon the ground that they violate the hearsay rule. But that is not by way of limitation of the other objections.

The Court: No. The same objection—let it be as broad as possible—and the Court will overrule it.

Mr. Grimes: These are offered as one exhibit.

(12 sheets received in evidence and marked Defendant's Exhibit Z.)

Q. I observe from Exhibit Z that a number of classifications are involved in connection with the answers. Will you explain to the Court how those classifications were made up?

A. Yes. The first question in the questionnaire is asking the respondent, or the person being interviewed——

The Court: Use "respondent"; that is good.

A. (Cont'd) ——respondent, after the introductory statement, "Will you please describe what each of the following services is," and there was, of course, a tremendous variety of answers to that question.

[fol. 462] The Court: What following services were they? Read them just so they will be in the record.

The Witness: The question continues: Savings account, compound interest account, special interest account, and thrift account. In response to the question about each of these four accounts there was a wide variety of answers, and those answers were——

Mr. Rollins: If your Honor pleases, I do not think the answer is responsive to the question made. I think the witness is now going to attempt to say what the results were of the survey, and if that is the purpose——

The Court: That ought to be in a single question, I think.

Mr. Rollins: If that is the intent of the question, your Honor is permitting the witness to testify along those lines and I am going to interpose an objection upon the ground that it is violative of the hearsay rule and upon the ground that same is incompetent, irrelevant and immaterial to the issues in this particular action.

Mr. Grimes: My question, sir, does not yet call for the answer.

The Court: Your question was, Did you tabulate? Isn't that it?

Mr. Grimes: Yes, and to explain the classification, but my question does not yet call for the results.

The Court: He really is coming to results.

[fol. 463] Mr. Grimes: I simply want him to explain the method of classification and what the problem was without yet giving the results. We will put the results in.

The Court: Why not embrace results? I think you could

do it quickly. You would have it right in front of you, would you not?

Mr. Grimes: There are one or two other stages and then we will have results.

The Court: All right, do it your own way.

Mr. Rollins: I thought the witness was going to do that, from the language he was about to use or was using.

The Court: I would think, Mr. Grimes, that for the purposes of your record it would be a more impressive record if this gentleman gave us a narrative of just what he did, which I think will answer your questions. I will let him answer what he did.

Mr. Grimes: Yes, that is really what I want. There is no difference.

The Court: Then he will say he made these classifications, and so on and so forth. Now would you like to amend your question to read that way? State what you did with respect to this poll.

Mr. Grimes: Yes; yes, indeed.

The Court: All right. That means give the whole story, results and everything else.

Mr. Rollins: You mean your Honor is going to permit his conclusions based upon Exhibit Z in evidence?

[fol. 464] The Court: Yes, and we will add to it. State your conclusions with respect to what you did, so there will be no doubt about it.

Mr. Rollins: If your Honor pleases, I object to the answer intended to be elicited by the question, because it calls for an opinion of this witness to be based upon evidence which is purely hearsay, and upon the further ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Mr. Rollins: May I call your Honor's attention to the Court of Appeals ruling in *People v. Keough*, 276 New York?

The Court: Of course, you are right, it is hearsay.

Mr. Rollins: I gave that case to your Honor on the yellow paper. There an alienist was permitted to testify—

The Court: This I regard as entirely an exception to the hearsay evidence rule, and if there never was any authority for it, it would be my idea to consider making it proper

evidence. Whether I will or not will depend upon what you gentlemen—

Mr. Rollins: Because this violates all known concepts of expert-opinion ruling in New York State, and as I say, the Court of Appeals in that case, 276 New York—

The Court: Let us not go into that. I am going to give you the fullest opportunity to try to convince the Court that I should receive none of this evidence, and by the same [fol. 465] token I am going to give Mr. Grimes the opportunity to establish that I should make an exception to the usual hearsay evidence rule and be guided by this evidence. But that is something that I will do later on. Now I want to make the record.

Mr. Rollins: Moreover, even if your Honor received it in evidence and found it to be proper in the first instance, how much credence your Honor is going to attach to it is another proposition.

The Court: That is right. If I receive it, then I consider the weight of it. However, I think we are all ready now.

Mr. Grimes: Judge, may I just explain this—I think it will clear the issue—that there are several other documents I think properly belong in evidence prior to an expression by him of his opinion, and I am trying to bring them in one by one. I do not want to depart at all from your Honor's suggestion, but I conceive that we are not ready for the conclusion or the final tabulations. There are two other sets of documents, one being the standards by which he judged.

The Court: Would he not come to that in his narrative?

Mr. Grimes: I am not sure. He should. But, after all, it is up to lawyers to guide, I think.

The Court: That is right. Let me make myself clear. The only suggestion I was making, Mr. Grimes, was that [fol. 466] there are always two ways of doing this kind of thing. One way is to set out each little classification; the other would be to have a straight narrative and, as the witness comes to the beginning of a classification, you hand him the exhibit that supports his next testimony and he goes on and you have your exhibit before the Court.

Mr. Grimes: Very well, sir. I am trying to do both, present it both logically and chronologically, and I think if I

may be permitted to proceed, since I have a scheme in mind, we can proceed without delay and it will really shorten the discussion in the long run.

Mr. Rollins: May I also urge as an objection that expert opinion may only be rendered upon a hypothetical question and an assumption of facts in evidence, upon the assumption that the report is true?

The Court: Mr. Rollins, make that in your final motion to strike out. It is not any stronger here than it will be then, and you will have more time to make it more emphatic.

Mr. Rollins: An expert cannot render an opinion, if your Honor please, except on his personal knowledge or upon a hypothetical question upon competent evidence in the record.

Mr. Grimes: This is personal knowledge.

Mr. Rollins: He is stating a conclusion based upon nothing here except that he looks at sheets and says, "That's my opinion." But he is not taking into consideration [fol. 467] that what he has read and what he has calculated is true.

The Court: That will be something for you to argue when you move to strike out, and I will give it consideration. Go ahead.

Q. Did you have certain standards by which or upon which you based your classification?

A. I did.

Q. And those were in the form, were they, of definitions as to various types of accounts about which persons were questioned?

A. That's right. They are marked coding, codes.

Q. I show you a document and ask you whether this document sets forth the standards by which you judged the questions and recorded them in your calculation sheets.

A. These are the definitions that I used.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: I object to it. Whose definitions are they? If your Honor please, I object unless it is from a standard work, Webster's, or some other individual of recognized note. He said that is the standard he used. That is no proper basis of definition unless it comes from a source—

The Court: I will receive it in evidence. No matter what it is, that is what he used. No matter what it is, even if it is wrong, that is what he used.

(Received in evidence and marked Defendant's Exhibit AA.)

[fol. 468] Q. You stated that the answers to the questions asked were of a very considerable variety, did you not?

A. Yes.

Q. Did you make for the benefit of the Court a classification which includes under classified headings all the answers given to all of the questionnaires?

A. That is right. Each of the 928 answers to each question was classified, as you will later find them in this report.

Q. I show you another batch of documents and ask you whether that is the classification referred to.

A. This is a listing of how the answers were classified, the actual answers in the classification that was made.

Q. So, every answer given in the entire survey to every questionnaire which is now in evidence is listed here under the classifications which you made, is that correct?

A. Those are the listings for the question, "Will you please describe what each of the following services is: Savings account, compound interest account, special interest account, thrift account."

Q. That is the first?

A. First question.

Q. What will become the first table—the first question?

The Court: Your answer is yes?

The Witness: Yes.

The Court: The answers to every question in the questionnaires which are in evidence here were classified by you under some heading as it appears in that coding, is that what you call it?

The Witness: Well, there is a slight distinction here.

[fol. 469] The Court: Tell us what it is.

The Witness: It is the listing of every answer in response to the question, "Will you please describe what each of the following services is: Savings account, compound interest account, special interest account, thrift account." Now, in

the questionnaire there were other questions asking what—

The Court: We know that there were two other questions.

The Witness: That's right. The answers to that are not listed in this document.

The Court: No, that is just the definition listing there.

The Witness: Right.

The Court: But Mr. Grimes's question, to which I think you answered yes—but I know he wants the answer—By the way, what do you call that which Mr. Grimes holds in his hands now—classification something? Classification report? What would it be? Let us get a name for it.

The Witness: It is a classified response list of every answer.

The Court: The classified response list. Now his question was: Does that contain the answer of every person interviewed set up in classifications in which, your judgment prompted you to determine, those answers belonged?

The Witness: It does, yes.

The Court: That was what you wanted, was it not?

Mr. Grimes: Yes, yes.

[fol. 470] Q. And your answer is confined to the first question?

A. The first question, yes.

Mr. Grimes: I offer these in evidence.

Mr. Rollins: It is objected to upon the ground they are incompetent, irrelevant, immaterial, and violative of the hearsay rule.

The Court: I will receive them in evidence.

(Received in evidence and marked Defendant's Exhibit BB, being 22 stapled groups.)

Mr. Rollins: May I also state that by indirection that exhibit tends to express an opinion without the hypothesis that the statements upon which the conclusion is based therein are true.

The Court: That will be considered as part of your objection. The Court overrules the objection.

Q. Did you also make a tabulation in numbers form of all of the answers given to all of the questions?

A. I did.

Q. Do you have that before you?

A. This set of work sheets includes every question in the questionnaire.

Q. Then did you make a table from that?

A. I did, yes.

Q. In fact, you made a number of tables from that, did you?

A. Yes.

Q. And you have them before you?

A. I do, yes.

[fol. 471] Q. Would you state what they are by description without yet reading the results into the record, beginning with the first table.

A. Each of the tables?

The Court: You can do that quite briefly. Are they reflective of your work sheets?

The Witness: These tables as typed in the report are an accurate reflection of the tabulations that we made from the 928 questionnaires.

Mr. Grimes: Now I offer those tables in evidence. If your Honor please, there is a document which I would rather not break down, and I intend to offer all of it. The written portion has a summary of Doctor Chappell's testimony. At the moment I am merely offering the tables through this witness.

The Court: Are they certain pages?

Q. Will you state where the pages begin and where they end?

Mr. Rollins: If your Honor please, I object to the offer of evidence.

The Court: Wait. He has not answered yet.

A. The tables in the report are pages 14 through 34.

The Court: That is what counsel is offering in evidence?

Mr. Grimes: That is correct.

[fol. 472] The Court: You make the same objection to that?

Mr. Rollins: I make the objection upon the ground that the offer of this in evidence violates the hearsay rule and

upon the further ground it is incompetent, irrelevant and immaterial.

The Court: I will overrule the objection.

Mr. Grimes: Perhaps your Honor would like to examine that now.

Mr. Rollins: May I also be permitted to urge an objection. I note there is an opinion expressed in Exhibit CC. It is a conclusion based not upon the knowledge of this witness but upon matters dehors the record and without the hypothesis of any factual statement to justify the conclusion which appears in the record here, in accordance with the principle enunciated in *People v. Keough*, 276 N. Y. 141 and in *People v. Harris*, 136 N. Y. 423.

The Court: I will overrule the objection.

(Received in evidence and marked Defendant's Exhibit CC, being pp. 14-34 thereof.)

Q. Now, Mr. Brumbach, in your opinion, based upon your experience and based also upon the calculation work you did and every item thereof, are the percentage figures reflective in Defendant's Exhibit CC, being pages 14 through 34, of a brochure in evidence, accurate percentage figures representing the answers given by the respondents as a result of the interviews in the survey to which you have referred, each being a percentage figure under a described classification? Are those correct?

Mr. Rollins: I object to it, if the Court please, upon the ground it violates the hearsay rule and it is an expert opinion sought without a hypothetical question based upon relevant and competent matters in evidence, and assumption of the truth thereof.

The Court: I overrule the objection. Answer.

A. They are.

The Court: Let us get one more question, Mr. Grimes. Retain what you have in mind. (To Witness:) The question asked of you before was, Were the entries on that table, pages 14 through 34—Exhibit CC—reflective of the work sheets which were received in evidence? Now let us go back a little further. Are those work sheets reflective of

what you read on the questionnaires which are also in evidence?

The Witness: The work sheets are reflective of the 928 questionnaires, and the results from the work sheets are accurately reflected in the report, pages 14 through 34.

The Court: All right. That connects it.

Q. Now as to the method used in this survey, based upon your experience, your reading, your study of [fol. 474] the various methods by which public knowledge can be ascertained, will you express, please, to the Court your opinion of the methods used in this survey and the accuracy thereof?

A. I think that the methods used in this particular survey are the most reliable that we could use, and that the findings or results on pages 14 through 34 are an accurate reflection of the degree of knowledge of the persons in Nassau County in reference to the questions that we asked them.

Mr. Grimes: You may inquire.

Mr. Rollins: If your Honor please, I move to strike out the last answer, upon the ground that same violates the hearsay rule and that the conclusion reached by this witness is not based upon a hypothesis of any matters in evidence, competent matters, or as to the truth thereof, without the assumption as to the truth thereof.

The Court: I will overrule the objection.

Mr. Rollins: I could not have made my objection before because no question was asked as an expression of opinion but was an opinion expressed by reference in a document in evidence.

The Court: All right.

Mr. Rollins: That is the reason I had to move to strike out the answer.

Cross-examination.

By Mr. Rollins:

Q. Is your title "Professor" at the college, sir?

A. No, I am an instructor.

Q. You say you have a Psychology Department in Hofstra College?

A. We do.

[fol. 475] Q. And as a division thereof you say you are developing or attempting to perfect sample polls; is that what you told the Court?

A. No. We have a Psychological Workshop, which is not actually a part of the Psychology Department but is a separate division of the college.

The Court: The word was not "perfect" but "improve."

Q. Improve. You were trying to improve the Psychology Department, is that it?

The Court: No, the taking of polls.

Q. Polls?

A. The methodology in—

Q. Isn't sample polling or polls as we generally understand them today a matter of statistics under that particular subject?

A. There is an element of statistics in all surveys.

Q. Does not the study come under the subject of statistics?

A. I wouldn't think so, not completely.

Q. Take that poll that you said you worked in for the Socony Vacuum Oil Company. Your attempt was to discover the reaction of the public to a product manufactured and distributed, or rather I should say refined and distributed, by Vacuum Oil Company, isn't that right?

A. That's true.

Q. And that was an anti-freeze?

A. The one for Socony Vacuum Oil Company was gasoline and oil.

Q. That anti-freeze you were talking about is an oil, is it, a lubricant?

A. No, the one on anti-freeze was done for the du Pont Company.

[fol. 476] Q. What product did you inquire about of the public on the Socony Vacuum Oil?

A. Gasoline and motor oil.

Q. They have a standard brand of their own, have they not?

A. They do.

Q. What is the name of that?

A. Mobilgas is their gasoline and Mobiloil——

Q. Did you have your men there go to the stations using the product of Vacuum Oil?

A. No. We had our own men go to a sample of the population as a whole.

Q. But when you had these people at these gas stations, did they go to the competitors of Standard Oil or did they go to the stations using Standard Oil products?

A. You are confusing me because you are taking two different subjects and asking questions.

Q. All right. You wanted to discover sales resistance or the knowledge of the public dealing with products dealt in by the Standard Vacuum Oil Company, is that right?

A. Yes.

Mr. Grimes: I think Vacuum Oil is different from Socony.

Mr. Rollins: Socony Vacuum, Standard Oil, it is the same thing, is it not? Standard Oil Company operates Vacuum Oil, isn't that right?

The Court: (To Witness:) Do you know that?

Mr. Grimes: There is a Socony Vacuum.

The Witness: No.

The Court: Just say you do not know.

The Witness: I wouldn't know.

Mr. Rollins: We all know Standard Oil Company [fol. 477] of New York is Vacuum Oil Company.

Q. Let us take Socony Vacuum Oil Company. They sell products to——

The Court: Really, it does not make any difference to the question.

Mr. Rollins: It makes no difference.

Q. They sell petroleum products, is that right?

A. Right.

Q. And they were naturally interested in the marketing of their product, is that correct?

A. Right.

Q. And the reaction of the public to their specific products or that of their competitors?

A. Both.

Q. In other words, you placed your men at gasoline stations, is that right?

A. No.

Q. Where did you place your men to discover that?

A. Went out and interviewed in homes.

Q. Did you not tell the Court that you placed men around gasoline stations?

The Court: No, that was for the anti-freeze.

Q. You went to the homes, is that right?

A. Right. I didn't personally but we had interviewers.

The Court: He means your men.

Q. Did you send these interviewers to homes that had no automobiles?

A. Yes.

[fol. 478] Q. To find out whether they preferred what?

A. To find out first if they had an automobile.

Q. If they said they did not have an automobile, then what was the next question?

A. Did they ever buy gas and oil for other persons' cars. You don't have to have a car to buy gas and oil.

Q. Did you ask them if they drove a car?

A. Yes.

Q. If they did not drive a car, was any other question asked them?

A. No.

Q. In other words, you were only interested to find out the reaction and opinions of those people who had occasion to use their product, is that right, or for themselves or purchase it for others?

A. I can't remember too clearly, but I think that on some of those particular type of surveys we did ask the people for knowledge of the particular—

Q. I am talking about that particular survey.

Mr. Grimes: Would you finish the answer.

The Witness: Well, there were several done.

Q. The one where you said if he did not drive a car or did not own a car that was the end of it, you do not want to change your answer there, do you?

A. No——

Q. It would serve no useful purpose, would it, to find out——

The Court: Wait a minute. One question. He said no, he does not wish to change his answer. Now, next question.

[fol. 479] Q. As a psychologist you know that it would serve no useful purpose to inquire of a person's opinion about something he had no use for, isn't that right?

A. I have to answer that "No." It does serve a useful purpose, because the attitude of the public toward a company of that size is an important piece of information to that company.

Q. You would like to know in a survey of that kind, naturally, as to the preferences of the public and why, is that not right? Otherwise, your survey would be worthless, isn't that right?

The Court: Just a minute.

Mr. Grimes: Two questions there.

The Court: He only wanted to know what he was told to find out. That is his answer to that. He cannot go beyond that; isn't that right?

The Witness: That's right.

Q. To determine the preferences of a person for a product or a service it is necessary as a basis to decide whether there was a need for it, isn't that right?

A. Not necessarily. A person might buy a car. The attitude of the public toward the company is an important piece of information to the company. We have done surveys where we went out to find that out, too.

Q. You take that survey now where you said that once you found out—we are talking about that particular survey now—that the respondent did not have a car or did not drive a car, no further question you said was asked.

A. That is right.

Q. What was the question given you to determine in connection with that particular survey where that [fol. 480] was done?

A. The purpose of that particular survey was to get in-

formation about the gas and oil that was purchased by the motorist the last time and why.

Mr. Grimes: The last time and why?

The Court: And why, yes.

The Witness: That's right. But I can't generalize from that particular survey to the—

The Court: Counsel wants to know this. That was your objective. When your interviewer met a person who had no reason ever to use gasoline or oil, did the interviewer pursue the question, or did he leave the premises immediately?

The Witness: On that particular survey that we are discussing, he would leave the premises; he did leave the premises at that point.

The Court: That is the point that I think counsel is trying to develop.

Q. You were not to determine in this particular survey in this case the matter of preference, were you?

Mr. Grimes: Which case?

Q. In this case, in this litigation, the subject matter of your inquiry did not deal with a preference among people, did it?

A. No. It dealt with public knowledge.

Q. This is not a matter of public opinion—that is what I am trying to say—it is not a matter dealing with public opinion, the subject with which you were concerned in this very litigation, was it?

[fol. 481] The Court: No, he says public knowledge as distinguished from public opinion.

Q. Most polls, as we understand them, such as political polls, deal with public opinion, is that right?

A. Do you say most?

Q. I am not talking professionally; I am talking of being generally known in the public.

A. There are two categories in your question.

Q. All right. Withdraw the question.

The Court: I do not think it is important.

Q. So, your purpose, you say, in this particular poll was to discover how far the public had been educated by one

means or another in the knowledge of what these three or four words meant?

The Court: Terms.

Q. The terms savings, compound interest, special interest, and thrift. Is that right?

The Court: As limited by the questions that they were asked.

A. Yes.

Q. You were not given the proposition to find out why, were you?

A. What?

Q. Why the public did not know about the difference, I mean a large percentage of the public, in the meaning of these terms?

A. No.

Q. That was possible of ascertainment by your scientific knowledge which you say you possess? Was that possible of ascertainment by your methods?

[fol. 482] Mr. Grimes: I object.

The Court: The question is withdrawn and we have a new one. I will allow that question. Was that possible of ascertainment by you?

A. It would be extremely difficult because we would have to go so far back into the person's beginning knowledge that he might not be able to recall.

Q. What I am asking is, Is it possible of calculation? I am not talking about how difficult it is. But is it possible of calculation by sample polls as to the extent of one's ignorance, as you say you established in this case?

Mr. Grimes: Excuse me. Is this question still relating to why?

Mr. Rollins: Yes, in this particular case.

The Court: Yes, but it is a new question. The question simply is, Could you have ascertained why the person interviewed made the answer which he did make?

The Witness: Why he did or did not know the answer?

The Court: Did or did not make the answer that he did make. For instance, some answered correctly, some an-

swered incorrectly, in your judgment. This question is simply as follows: In the method of laying out that poll could you have also pursued the point so that you could report why he did not know the correct answer or how it was [fol. 483] that he knew the wrong answer? You answered before that any search of that kind would go too deep, and is that still your answer?

The Witness: That would have to be my answer until I could do some preliminary testing of it in the field to find out.

The Court: I would think that would be a very deep inquiry.

Q. Let me ask you this: Your subject of inquiry was a matter of education, isn't that right, what the person knew or did not know on any given subject?

A. If you will leave out the education part, I will say yes.

The Court: Knowledge.

Q. There are two ways that a person knows about anything in this world: either through education or experience.

The Court: Wait a minute. Let us not go back.

Mr. Rollins: I am now going to the realm of psychology, Judge.

The Court: All right, but let us not go back too far.

Mr. Rollins: I am going to go to the immediate, and I think I will just leave it there and your Honor will see what I mean.

The Court: I follow your line of questioning completely.

Q. Knowledge by a person is acquired either by education of one means or another or by experience, isn't that right?

[fol. 484] The Court: I do not think you ought to ask that question because—

Mr. Rollins: If your Honor will permit me, I will show you a logical conclusion that this poll is not reliable.

The Court: But I would like, myself, to have a much longer time space at the end of your question, if I were a witness, to be expected to answer that question. I don't

know, I think there are a lot of things we know that we have not learned by education.

Mr. Rollins: Experience and education are the only two ways, Judge. It is what somebody told me or what I learned from a book, that is, education or advertisement.

Q. Is advertisement a matter of education?

The Court: Don't get into that. Ask your question, whatever you want. (To Witness:) If you cannot answer it, just say, "I cannot answer it."

The Witness: What is the question?

The Court: We ought to go back to the one question, Are there two ways of gaining knowledge—education and experience? Are you willing at this moment to say that those are the only two ways? Maybe they are, I don't know.

The Witness: Neither do I, Judge.

Q. Is advertisement a method of education?

A. I think you—

[fol. 485] The Court: Wait. I will have to answer. That word "education" is double; it comes from *educare*; you draw it out of the pupil, that is how you educate. You do not pour anything into the pupil.

Mr. Rollins: This is a knowledge pull, Judge. You can only acquire knowledge through education, either by word of mouth or by writing.

The Court: When you use the word "education" in the sense of that question, you are using it in the sense of teaching. In teaching, where education is used there, the teacher does not inflict knowledge on the pupil; the teacher draws knowledge from the pupil.

Mr. Rollins: No matter how it is, knowledge is acquired. That is my whole purpose.

The Court: All right.

Mr. Grimes: I am going to object to further interrogation along this line, upon the ground of one of two things.

The Court: Wait until we get a question.

Mr. Rollins: I am just going to show you how unreliable this poll is, if you will let me.

The Court: Go ahead, but try to keep the questions within the realm of their answers.

Q. You went to discover knowledge of the public as to three trade names, as far as you were concerned; right?

The Court: Was it not four?

[fol. 486] Q. Four: savings, thrift account—

The Court: We know them.

Q. —compound interest account, special interest account. You deal with the subject of marketing, is that right?

A. Right.

Q. Will you concede that so far as this poll is concerned they are dealing with four trade names?

Mr. Grimes: I object to that. Contrary to all the evidence.

The Court: Trade terms would be better.

Mr. Grimes: Banking terms.

The Court: I will allow the question.

Q. They are trade terms, are they not?

A. Terms used in banking, yes.

Q. Does the word Four Roses suggest anything to you?

A. Yes.

Q. What does it suggest?

A. Four Roses, whisky.

Q. The public knows that, is that right?

A. I don't know.

Q. But you knew it. How did you know it?

A. I buy Four Roses whisky.

Q. You drink whisky. Does the word LS/MFT suggest anything to you?

A. Yes.

Q. What?

A. Lucky Strike cigarettes.

Q. "Be Happy—Go Lucky," what does that slogan represent to you?

A. It's a very pleasant commercial on television.

Q. Dealing with what product?

A. Lucky Strikes, I think.

Q. That is cigarettes?

A. Right.

[fol. 487] Q. And that came to you as a matter of adver-

tisement, is that right, looking at television and through the radio and through newspapers; right?

A. I can't actually recall how the information originally came to me.

Q. But you are a psychologist, are you not?

A. Yes, but I don't study things that are so irrelevant to my—

Q. What you just told me is a matter of common knowledge, isn't that right, that the public possesses the same information that you do?

A. I haven't made that study yet.

Q. I am not talking of what percentage, but there is a great part of this public that has the same knowledge that you do on the subject I just questioned you about dealing with these products.

A. I won't disagree with you. I am sure that there must be a lot of people who hear the television programs.

Q. How is it possible to convey to the public the knowledge as what those slogans or trade terms mean except by advertisement one way or another?

A. Well, one way or another I think covers all of it.

Q. How about all media of advertising?

A. I don't understand what he means.

Q. Here is the question. What I am trying to find out in dealing with products and securities as such or services, as a matter of marketing the knowledge of the public is acquired of the particular quality and what it represents through advertisement, isn't that right?

The Court: Suppose you change that and make it possible [fol. 488] for him to answer. It is hard for him to answer what the public—

Mr. Rollins: He is a specialist, Judge. That is what they said he is.

The Court: He has not made any attempt to say what the public understands.

Mr. Rollins: That is what he expressed an opinion that it does.

Mr. Grimes: After a survey.

The Court: He is not trying to state what the public understands. Now if you change your question around, you

could ask him, what did the proponents of the advertising want the public to understand? That would be different and I think he could know what the words were and he could form a conclusion as to what the advertiser hoped to have the public understand.

Mr. Rollins: Not on the Four Roses. But your Honor gets the general idea of what I mean. Anyhow, there is no jury here, so your Honor gets the idea.

The Court: That will produce the point of evidence that you want, whereas your question in the form you are putting it he has had three or four times now and each time he said that in the absence of having made some test he cannot tell you what the public understands about something.

Q. Was it the intention of the advertiser in using the term LS/MFT to create the impression that it dealt with cigarette products?

A. I don't know what the intention of the advertiser was to use that meaningless jumble.

[fol. 489] The Court: The point is, what do you feel? Have you an opinion because of your experience as to what the advertiser wanted to convey by that slogan, if you call it such? That is what counsel would like you to answer.

The Witness: My opinion is that he wanted to call the public's attention to his product.

Q. Yet the name LS/MFT as such, did not indicate in our language that it was not a cigarette, did it?

Mr. Grimes: That it was not a cigarette?

Mr. Rollins: That is right. The language itself did not suggest that the matter was dealing with a cigarette.

Mr. Grimes: I object to that.

The Court: Or some tobacco or tobacco derivative.

Q. What I am trying to get at, is it possible by the medium of advertising to acquaint the public with a trade term to suggest that it was dealing with a particular service or product?

A. Yes, that is possible.

Q. And that applies as well to savings accounts or time deposit accounts or to any commodity or security or investment, isn't that right?

A. I can't say it applies equally well, because you have to start out with a certain public understanding of the term.

Q. Could you so educate, as in the case of the cigarette by using a term LS/MFT, or by the term Four Roses ind-[fol. 490] eating a product, that the word "thrift" stands for a passbook account, by a medium of advertising?

Mr. Grimes: Objected to.

The Court: I will allow it.

A. With an unlimited advertising budget you can do anything.

Q. I am talking about if they have all the budget they need.

The Court: He says they can do anything. He has answered you. With an unlimited budget he thinks you could.

Q. And Lucky Strike has an unlimited budget?

Mr. Grimes: I object to that.

Q. Has it or has it not?

Mr. Grimes: Contrary to fact.

Mr. Rollins: I am assuming they have from the amount of advertising we see.

Q. If you desired to obtain knowledge on the subject as to what is a thrift account, would the probable margin of error be less in the case of a person who has a savings account or its equivalent than in one who never had a bank account of any kind?

Mr. Grimes: I object to the form of the question.

The Court: I think you had better reframe that. I did not catch the beginning of it.

Mr. Rollins: Question withdrawn.

[fol. 491] Q. In your questionnaire that you put to the public I noticed that there is an omission of any reference in the interview as to whether or not the one interviewed ever had a bank account of any kind.

The Court: That is correct, is it not?

Q. That is correct?

A. That is true.

Q. And so from the reports on these interviews which you said you had scanned you did not know whether or not any of those persons had a bank account of any kind, isn't that right?

A. For any specific person I did not know whether he ever had a bank account or not.

Q. That is with all of those 928 answers?

A. That is true.

Q. Would the margin of probable error be greater or less in the case of a person who had a bank account of some kind?

Mr. Grimes: Objected to unless we know in reference to what.

Q. In comparison to those who never had one or never had the immediate possibility of opening any such account.

Mr. Grimes: Objected to as meaningless, unless we have a standard from which we can compute error. Error is in reference to truth. The question does not include any such.

The Court: Suppose we put the question to the gentleman this way—

Mr. Rollins: Question withdrawn.

[fol. 492] The Court: Suppose I put that question. I know what you are trying to reach. Assuming that there is a margin of not error of the poll but error by the people interviewed in answering their questions, counsel wants to know, would that margin vary if you interviewed people who never had a bank account, on the one hand, and people who did have a bank account, on the other hand? Do you understand the question?

The Witness: When you say bank account, you are talking about some form of bank deposit?

The Court: Any bank account at all. One group had bank accounts of some kind and the other group never had a bank account of any kind. Would the margin of error vary in the answers which were made as to the meaning of those four terms, in your judgment?

The Witness: It would be my opinion that if they had had the experience of having a bank account, they would probably be able to give more accurate information.

Q. By what percentage?

A. I wouldn't be able to venture an estimate.

Q. Is it possible of calculation?

A. No. It would have to be done by survey designed for the particular purpose of determining that.

Q. Is there any such known survey? That is what I am trying to find out.

A. I wouldn't know.

Q. You would not know that?

A. No.

Q. Did you ever hear of any?

[fol.493] The Court: Of that particular question being sought?

Mr. Rollins: That is right.

The Court: I think if you asked him the question, could he devise such a survey, maybe you would get an answer.

Mr. Rollins: To establish a negative, sir? I am just trying to show it was a necessary ingredient in this poll to get an accurate survey. That is my purpose.

The Court: I understand what you mean, but now you have gone into the question of whether or not that could have been ascertained. I think you would have to ask the witness——

Q. All right, let me say, assuming that out of the 928 persons interviewed not one had a job and not one had a means of livelihood or an income or property of any kind, assuming that was true in the 928 persons interviewed, you say they would be in a better position to reduce the margin of error for the purposes of determination and calculation by you, on which you have expressed an opinion, than in a case where each one of them had a job, had an income and a surplus?

Mr. Grimes: Objected to as incomprehensible and unanswerable for that reason.

The Court: I think that you mean there if you assumed that the 928 people who were interviewed had no means of obtaining money so that they would have no interest in banks, would you say in your opinion that their definitions [fol.494] of those four terms would be enlightening or valuable or of no value at all.

The Witness: Can I talk to you about it just a little bit?

The Court: Yes, answer it any way you want.

The Witness: Well, the assumption disturbs me, because the assumption is so contrary to what I know about the sample. But you feel I should go ahead and make that assumption.

The Court: That is the assumption counsel gave you, so you cannot change the hypothesis.

The Witness: I see. Then the assumption is that these 928 persons, by some chance, had no income, any of them.

The Court: That is right, or money or any interest in banks.

The Witness: Then I think that those persons would probably show less knowledge of the terms than the ones that we found in our survey.

The Court: All right. That is the answer.

Q. By what percentage, if it is possible of calculation?

A. I would have to go out and make a survey among 928 people who were in this peculiar position that you are describing and then compare it with the others.

Q. Let us put it this way: Would your conclusion, an opinion rendered in this court as indicated in Exhibit CC, [fol. 495] be a reasonable opinion of the facts therein stated? In other words, is your opinion worth anything if we assume 928 didn't have a job or had no income or money of any kind?

Mr. Grimes: Objected to.

Mr. Rollins: I have not got the burden in this case.

Mr. Grimes: Perfectly pointless.

The Court: I think I will sustain the objection. The witness has answered the question. I think you have the answer. I think he answered the last question fully.

Q. These interviews or reports of the 928 of which you calculated and based your Exhibit CC here, that is the summary and the analysis, does not indicate, does it, what these persons did for a living, do they?

A. It does not, no.

Q. Do they reflect any savings or other bank accounts?

The Court: Wait a minute.

Mr. Rollins: Strike that.

Q. Or any bank accounts?

The Court: No. You see, you could ask a great many questions on this, but the exhibits speak for themselves. The testimony in this case is that the interviewers asked precisely those questions and they wrote on those papers the answers that they got. Now the witness could go on indefinitely telling us what was not on the questions.

[fol. 496] Q. And your opinion rendered in Exhibit CC was based solely upon what the interviewers gave you by way of return in the reports?

The Court: In their questionnaires.

Q. In their questionnaires. Isn't that right?

A. The Exhibit CC is based solely upon the 928 questionnaires which you already have received.

Q. You have no independent personal knowledge thereof of the facts stated in those reports given to you by these interviewers?

The Court: He said solely.

Mr. Rollins: All right, solely. I just want to show there was nothing else.

Q. Now I notice in your category you have ages. I don't know the number of the exhibit of the interviewers. I notice some of them had the age group of 21 up to age group 29, or something like that.

A. Look on one of the tables and you will find it.

Q. Do you know what page you would find that, sir?

A. Starting with page 17.

Q. Referring to your Exhibit CC, on page 17 you have a category, Total Men and Women Age 21 to 29?

A. That is right.

Q. Where did you get the age group 21 to 29, from what information?

A. You mean how did I decide to use that particular—

Q. That the persons interviewed were in the age group of 21 to 29.

A. The interviewer supplied that information.

Q. Was there a category in your questionnaire that you proposed to each respondent as to their age? Was there a [fol. 497] question put to each one in your questionnaire, "How old are you?"?

A. We did not ask that. That was an estimated age obtained from the interviewer.

Q. You did not tell that interviewer to find out how old they were, did you?

A. If they were not able to make an estimate, why, they could sometimes require them——

Q. You mean that each interviewer estimated the age of the person he interviewed or she interviewed?

A. That's right, largely that. Sometimes it is difficult to ask women about their ages.

Q. But you did not include that in the questionnaire, is that right?

A. It is in the questionnaire, if you will look at the last page of the report that you have in front of you.

Q. I am talking about in the questionnaire that you prepared as to the age.

Mr. Grimes: He is saying it is in there.

Mr. Rollins: Where is that? That is what I asked.

Mr. Grimes: Let him finish his answer and you will have it.

A. If you will look on the last page in the report just before the blue page.

Q. You have there approximate age, is that right?

A. Right.

Q. And that was given to the interviewer to appraise, himself, from personal appearance, isn't that right?

A. Right.

Q. At the age group that represented in your report, it is merely the opinion of each person who interviewed each [fol. 498] respondent rather than information furnished?

A. Well, it wasn't an opinion in all instances. In some instances we would get the information because the first question in the questionnaire when we were listing the persons was, how many persons are there in your family 21 years of age or over? People who don't object to giving their age frequently at that point would give it, but——

Q. But the ages that you had——

Mr. Grimes: Wait until he finishes.

A. —substantially that classification was based on the interviewers' estimate of age.

Q. That is what I want to know. You call this a stratified sample?

A. Not in your terminology.

Q. I am asking you, in whose terminology? What is your description of this kind of poll?

A. We are now talking about the sample?

Q. Yes, this particular sum total of all your efforts here, what kind of a poll would you say it is?

A. The sample is a probability sample, in which stratification was made by geographic area and incorporated city, town and village size.

Q. There is such a thing as a stratified sample, isn't there?

A. Yes.

Q. And the stratified sample means a cross-section, does it not, of opinion?

A. Stratification, as I understand it, is one of the steps that is used in obtaining a cross-section.

Q. And a stratified poll is more accurate than a random poll, is it not?

A. Absolutely not.

Q. It is not?

A. No.

Q. There is that distinction between a stratified poll and a random poll?

A. Would you repeat that?

[fol. 499] Q. Is there a distinction between a random poll and a stratified poll or sample?

A. Yes. Both stratification and randomness are two techniques that are used in obtaining a poll, and for the sample to be a good one you have to have randomness within strata.

Q. You say that knowledge of any particular subject prevails in a given community? That is, take a square block of any community. You say that knowledge of a per-

son on any given subject in one block in proportion is the same in the next square block?

A. No, I would not say that.

Q. Wouldn't knowledge on any subject depend upon a person's education in a large measure and his own experiences?

A. Yes.

Q. Does geographic position in any given community determine that?

A. To a large extent it does. People who live in those areas where there are large homes probably have greater means, greater education. People who live in other areas of low income frequently have less education, less knowledge.

Q. You would not say that statistics, taken as we are dealing now with the subject of polls, is an exact science, would you?

A. Statistics is an exact science, yes.

Q. I am talking about this particular subject.

The Court: Wait a minute. Does it matter?

Mr. Rollins: I know it is not. That is the reason I asked him that.

Q. Is it not one of the opening statements on the subject of statistics dealing with sample-taking that it is not an exact science?

[fol. 500] A. Well, I can only give you the answer in my own terminology. I would say that a statistical sampling is a very exact science.

Q. Is there any margin for error as to conclusions?

A. There is a possible margin of error that is due to the fact that you are taking a sample of the population rather than a complete census. It is not exactly an error but it is a possible variation from the true figure that is due to the fact that you didn't go out and interview every one of the persons in the county 21 years of age and over.

Q. Would you have gotten a better result and a more accurate result if you had interviewed persons who had a job and an earning power?

The Court: Only.

Q. Only.

A. It is kind of hard for me to answer that, because I think that we did interview many people in that category. We interviewed the people in that category—

Q. That is just merely guessing, are you not, doctor? Are you not just guessing now when you say you believe? You have nothing to base that on except that they live in Nassau County, isn't that the reason?

A. Well, you pointed out that I learn things from experience. I have had a lot of experience with this particular type of—

Q. Does the type—

The Court: Wait. He has an answer to that last question. The method that you pursued in setting up the poll is the reason for your answer, is it not?

The Witness: Right.

[fol. 501] Q. What was the method? Just picking them out of a photograph taken from the air, isn't that right.

A. The most precise method that we have been able to develop yet, and I have worked in this field for a number of years.

Q. You mean to tell me that your opinion expressed here as a scientist reflects an accurate state of knowledge on the subject of inquiry without regard to whether or not the person interviewed had a job, had an income?

A. I think that the finding—

Q. Or had any property whatever?

A. I think that the findings of the survey are an accurate reflection of the knowledge of the total population 21 years of age and over in Nassau County in reference to the four accounts that we inquired about. Does that answer it?

Q. But supposing all those you inquired about never had a job and did not work and had no property or any income, would your conclusion to the Court that the majority of people in Nassau County did not know the meaning of those four terms reflect a true condition?

Mr. Grimes: I object to the form of the question. I object to its assumption of a state of facts exactly contrary to several days of proof here.

Mr. Rollins: Judge, this man is a scientist, and a scientist

only upon data he gathers, and from the data under consideration he could not base a conclusion.

The Court: I think the question ought to be allowed—

Mr. Grimes: The testimony, sir, is—excuse me.

[fol. 502] The Court: —although I believe the witness has answered the question.

Mr. Rollins: I don't think so.

The Court: Before.

Mr. Rollins: No, sir.

The Court: The Attorney General's question is, if it is a fact that of the 928 interviewed a majority of them were—

Mr. Grimes: He said all of them.

Mr. Rollins: All of them.

The Court: You said a majority at one time.

Mr. Rollins: All right, take a majority or all of them. We have a right to assume that.

The Court: No, he answered all before. I would not allow that question. But now I understood he said a majority, consequently it is a different question, so all of them were ineligible to deposit money in banks. That is a short way of saying all this about being out of work and not having money. That is what I mean by ineligible. That is the question.

Mr. Grimes: I object to that as so hypothetical and so contrary to fact that no answer can possibly have any meaning or even utility.

Mr. Rollins: I submit, Judge, I have a right to assume my state of facts, because he was just putting on surmise and conjecture.

The Court: I will have to allow it. That is tacked on in front of the question. Would you then say that your poll [fol. 503] was an accurate reflection of the population of Nassau County over 21 years of age?

Mr. Grimes: In other words, if you have done just the opposite of what you did do, would you get the same result?

Mr. Rollins: That is not the question. Not the opposite. I am assuming what he did.

The Court: I think, as I allowed the question, if all the people were disqualified to be interested in bank deposits, I will allow that same question, if a majority of the people actually interviewed were disqualified from being inter-

ested in bank deposits. Do you understand that word "disqualified"? We are trying to shorten this thing up.

The Witness: And I am further to suppose that, contrary to the steps that we took to insure a good sample, it is a sample of persons who have no income that they could deposit?

The Court: Yes, a majority of the 928, you are to assume that. Disregard the efforts you made not to have such a one-sided interview.

The Witness: Then we would have gotten substantially different results from the ones that we had in the report.

Q. And it would not reflect the knowledge of the majority of the people in Nassau County with respect to the four terms of banking?

A. Now, then, when you say "it," are you referring to this hypothetical sample that we are discussing?

The Court: Yes.

[fol. 504] Q. That is right.

A. That hypothetical sample of 928 people none of whom had money they could deposit would not be an adequate reflection of the total county.

Q. And your opinion would also vary if it dealt with a majority who did not have any income or any money? In other words, your answer would—

The Court: That is it. You have asked it. (To Witness:) You said "all." Would you say the same if you discovered a majority of those interviewed were of that class you just defined?

The Witness: If a majority had no assets at all?

The Court: Yes, no interest in deposits or money.

The Witness: That is a little hard to answer, because I have to know what majority of the people haven't deposits. If 51 per cent, I would say.

The Court: All right. Maybe that is a sufficient answer. Go ahead.

Mr. Rollins: What was the answer to that question? I did not get it.

The Court: The first answer was, that would be very hard to answer from his knowledge. Then he added to that. Read that.

(Answer read by reporter.)

Q. Your conclusion, you said, as reflected in Exhibit CC, is based primarily upon the reports of the interview received from the interviewers, is that right?

The Court: Based entirely.

[fol. 505] Q. Entirely.

A. If you can call these tables conclusions, I would say that it is based entirely.

Q. You state it is an opinion there, do you not?

A. We don't usually use the term "conclusion."

The Court: You will have to divide that. He does not say that his table is an opinion. He says his table is what he worked out after reading the answers to the questions.

Mr. Rollins: And I ask your Honor to say it is an opinion.

The Court: The one point where his judgment entered into that—and I tried to emphasize it before—was where he exercised judgment in classifying those people and the interviewers exercised judgment in classifying those people as to age. Opinion does not appear anywhere except for those two exercising-of-judgment incidents. Now, he may give his opinion about something else, but he did not give it with respect to that. Did I state that correctly?

The Witness: That is right, yes.

Q. You have expressed an opinion in substance here that most of the people in Nassau County or a great majority of them, at least of those interviewed, do not know the meaning of the words thrift account, special interest account, and compound interest account; is that not correct? Have you expressed that opinion?

The Court: Wait.

Mr. Rollins: That is the inference here.

The Court: You will have to make it this way. He does [fol. 506] not express an opinion out of a clear sky. He gives it as his opinion, based upon the compilations that he had made here.

Mr. Rollins: He says it is correct and scientifically correct.

The Court: That is right.

Mr. Rollins: So, I am assuming what he says is based on it.

The Court: When you ask him does he give an opinion, you will have to give him the basis of what his opinion is based upon.

Mr. Rollins: We are assuming he based it on something here.

The Court: Yes.

Mr. Rollins: That is what I am starting from, from the proposition.

The Court: He will answer that question.

Q. You have expressed an opinion to the Court directly or inferentially, I don't know which—to me it appears you did it affirmatively and unequivocally—that based upon the interviews of your field personnel you have reached the conclusion that the majority of people in Nassau County do not know the meaning of the terms compound interest account, special interest account, and thrift account. Am I correct in making that assumption of fact? Did you express such an opinion?

The Court: Wait. He looks at his table now and he can answer that question. Does it indicate on the table there?

The Witness: Am I supposed to look at the table and then—

[fol. 507] The Court: Yes. Look at the table. He is asking you as an expert, after you examine that table, is it your opinion that—

Mr. Rollins: Did he say so or did he intend to infer? I am not asking him to express an opinion. I do not think he is qualified, Judge.

The Court: You asked him, did he make that statement in the way of an opinion.

Mr. Rollins: Indirectly or directly or inferentially. That is why I say they slipped one in here without asking a hypothetical question on which to base such an opinion, and they have received indirectly opinion evidence in violation of the accepted rule of evidence.

The Court: Now, your question is, Do you remember whether you gave an opinion to the effect on the witness stand here—I do not know whether you did or not, my-

self—that a majority of the people of Nassau County do not understand the meaning of those three terms, the last three of the four, as revealed by——

Mr. Rollins: Defendant's Exhibit CC.

The Court: ——the questionnaires that came before you and as is stated in your table CC.

The Witness: Is the question did I say it? Or is it in the report?

The Court: No, the question is, Did you say it sometime during your testimony.

The Witness: I didn't say it, no.

Q. Did you infer it in the preparation of Exhibit CC?

The Court: Infer it?

[fol. 508] Q. Did you so state it in words or substance?

Mr. Grimes: I will concede he said he worked on the entire survey. Maybe this will shorten it.

Q. Does it appear from an examination of Defendant's Exhibit CC?

The Court: What?

Q. That a majority of people in Nassau County—that is by indirection.

The Court: I see. I do not think we have to have his opinion about that. CC is in evidence. The percentage is there. And as I went through it I could see that that is a fact.

Q. Since your Honor has made that observation, would the same conclusions stated on Defendant's Exhibit CC appear—namely, the inference created thereby that most of the people in Nassau County do not have an understanding of the three commercial terms or trade terms: thrift account, special interest, or compound interest account? Would you make the same conclusion and express the same opinion if a majority of the people interviewed and upon whom that report is based—namely, Defendant's Exhibit CC—were not employed and had no income or property of any kind?

A. This is the same question. I have to make the supposition that, contrary to what we have done, the assumption is that we come up with a sample of people——

FILE COPY

Vol. II

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

1917-1918

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

VOL. II

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

	Original	Print
Matthew N. Chappell (Recalled) ..	514	388
Willard K. Simmons (Recalled) ..	523	395
William J. Boyle ..	533	402
Charles W. Green ..	540	407
Colloquy ..	550	414
Testimony of Arthur T. Roth ..	554	417
Plaintiff's motion to strike out evidence and for judgment (County of Nassau) ..	673	503
Plaintiff's Exhibits ..	711	529
1, 2, & 3—Advertisement appearing in Long Island Daily Press, March 10 and March 24, 1947 and in Nassau Daily Review-Star, March 17, 1947 ..	711	529
4, 5, 6—Advertisements appearing in News- day, May 8, June 17, 1948 and January 4, 1949 ..	715	530
7, 8, 12—Advertisement and Circular; Ad- vertisement appearing in Newsday and in Nassau Daily Review-Star, March 29, 1950 ..	717	530

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 23, 1953.

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Plaintiff's Exhibits—Continued	Original	Print
9A—Envelope containing various forms	718	531
9B—Envelope containing forms for opening of a Savings Account	719	532
9C—Envelope containing forms for opening of a Children's Savings Account	720	533
9D—Deposit Slip for Savings Account	721	534
9E—Card for opening Savings Account	722	535
9F—Card for opening Children's Savings Ac- count	723	536
9G—Card for opening Special Checking Ac- count	724	536
9H—Deposit Slip for Checking Account	725	538
9I—Envelope containing forms for opening a Special Checking Account	726	539
9J—Business Reply Card	727	540
9K—Draft	728	541
10A—Business reply envelope	729	542
10B—Letter signed by Arthur T. Roth	731	542
10C—Application Slip	732	543
11—1948 Annual Report of the Defendant- Respondent Bank	733	544
13A—Deposit Slip for Savings Account	735	578a
13B—Withdrawal slip for Savings Account	736	579
14—"Dime-Saver" issued by Defendant-Re- spondent Bank (omitted in printing, pur- suant to stipulation)	736	
15 A, B, C—Letters dated April 16, 1947; April 3, 1947; and March 25, 1947 from Deputy Superintendent of Banks to Arthur T. Roth	736	579
16—Identification Card of Bank Examiner, Arthur R. Seaton	738	581
17—Examiner's Comments, dated April 10, 1950	739	581
18-28 (inclusive)—Exterior and interior photographs of Bank	741	585
29—Photographs of Deposit Slip for Check- ing Account and Savings Account (copy) (omitted in printing)	763	
30 & 31—Photographs of interior of bank	765	598
32—Photographs of withdrawal slip and blot- ter	769	598
33—Certificate of State Superintendent of Banks	770	599

INDEX

iii

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Plaintiff's Exhibits—Continued

	Original	Print
34—Certificate of Comptroller of the Cur- rency, No. 12997	772	600
35—Certificates authorizing change of name and change of corporate title	773 775	601 602
36—Financial statement		

Defendant's Exhibits:

A—Preliminary Architect's Drawing of bank building and proposed new wing	777	602
B—Architect's Drawing of westerly addition to bank (omitted in printing, pursu- ant to stipulation)	778	603
C—Brochure distributed by Defendant, show- ing sketches of various portions of the bank and facilities offered to the pub- lic	779	605
D-R—(Omitted in printing, pursuant to stipulation)	780	
D-G—Forms of Questionnaires used in connection with poll survey	780	621
H—Report of Bureau of Census, U. S. Department of Commerce	781 781	621 622
I—Aerial Survey of Glen Cove	781	622
J—Aerial Survey of Levittown		
K—Map showing location of clusters of Nassau County	781	622
L—Street and Road Map of Nassau County	782 782	622 622
M—Tippett's Random Sample Numbers		
N—For identification—Tippett's Table of Random Sampling Numbers	782 782	622 622
O—Array Sheets—Urban Population	783	623
P—List of Clusters for Glen Cove	783	623
Q—Pre-listing Sheets for Cluster No. 15		
R—Array Sheet for Unincorporated Areas	783	623
S—Forms used by Hofstra College in survey covering services utilized by financial institutions	785	624
T-BB—(Omitted in printing, pursuant to stipulation)	786 786	
T—928 Questionnaires	786	625
U—22 Sets of Pre-listing Sheets		
V—Computations showing Federal and State Income Taxes	786	625

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Defendant's Exhibits—Continued

	Original	Print
W—For Identification—Regulation Q of the Federal Reserve Bank of New York	786	625
X—For Identification—Regulation D of the Board of Governors of the Fed- eral Reserve System	787	625
Y—U. S. Savings Bonds Poster	787	625
Z—Calculation Sheets of Professor Brum- bach	787	626
AA—The definitions used in connection with Hofstra Survey	787	626
BB—Classified Response Lists	787	626
CC—Hofstra College Survey Report (Pages 13-34)	788	626
DD—Additional Computations	809	639
EE—Typical Bank Advertisements	813	642
FF-II—(Omitted in printing, pursuant to stipulation)	814	643
FF—For Identification—Annual Report of Defendant for year 1946	814	643
GG—For Identification—Article appear- ing in July, 1947 issue of Bank- ing Magazine	814	643
HH—For identification—Article appear- ing in Magazine Digest	814	643
II—For Identification—Article appear- ing in February, 1945 issue of Readers Digest	814	643
JJ—Photograph of Elmont Office of De- fendant	815	644
KK—Photograph of Levittown Branch of Defendant Bank	817	646
LL—Photograph of Rockville Centre Branch of Defendant Bank	819	648
MM—Table Showing Increase in Deposits of Defendant Bank	820	649
NN—Stipulation, dated January 15, 1951 ..	822	649
OO—For Identification—Opinion of Comp- troller of the Currency, dated July 10, 1939 (omitted in printing, pursuant to stipulation)	825	652
PP—Form 2129-1 of the Treasury Depart- ment Office of Comptroller of the Currency	827	652

INDEX

V

Record from Supreme Court of the State of New York,
Appellate Division, Second Department—Continued
Case and exceptions (County of Nassau, Special
Term II)—Continued

Defendant's Exhibits—Continued

	Original	Print
QQ—SS—(Omitted in printing, pursuant to stipulation)	828	653
QQ—Savings Bonds Poster	828	653
RR—Form of Payroll Savings Purchase Order for U. S. Savings Bonds	828	653
SS—Literature regarding U. S. Savings Bonds	828	653
TT & UU—Letters dated March 29, 1947 and June 5, 1947 from President to Deputy Superintendent of Banks	828	653
Opinion, Cuff, J. (Nassau County)	830	654
Stipulation as to plaintiff's exhibits	856	672
Stipulation as to defendant's exhibits	857	673
Stipulation settling case	858	674
Order settling case	858	674
Order filing record in appellate division	859	674
Notice of appeal to Court of Appeals (County of Nassau)	863	675
Order of reversal (Appellate Division, Second Judicial Department, Borough of Brooklyn)	865	676
Judgment of reversal (County of Nassau)	868	677
Opinion of the Appellate Division, Second Department	871	679
Dissenting opinion, Nolan, J.	876	682
Clerk's certificate (omitted in printing)	877	
Proceedings in Court of Appeals of the State of New York	879	683
Order granting motion for leave to file a brief amicus curiae	879	683
Opinion, Desmond, J.	881	684
Dissenting opinion, Fuld, J.	888	690
Remittitur	892	692
Judgment of affirmance by Supreme Court on Remittitur from Court of Appeals	896	693
Affidavit	899	695
Petition for appeal	903	697
Order allowing appeal	904	697
Assignment of errors and prayer for relief	905	698
Citation (omitted in printing)	908	
Bond (omitted in printing)	909	
Statement required by Paragraph 2, Rule 12 of the rules of the Supreme Court (omitted in printing)	911	
Statement of points to be relied upon and designation of parts of record to be printed	914	700
Order noting probable jurisdiction	918	701

The Court: That is right, yes.

[fol. 509] A. —most of whom are unemployed and have no means.

The Court: They are disqualified to make deposits in some form or another. Now he wants you to assume that, and the question is, looking at the table, not did you say so before, but is it your opinion now that if that were the situation you would be able to say that a majority of the people of Nassau County do not understand the meaning of those terms?

The Witness: If that were the situation as you described it, I would not be able to draw the conclusion which is drawn from this report.

Mr. Rollins: Thank you. That is all.

Redirect examination.

By Mr. Grimes:

Q. And if, quite contrary to the fact, you had confined your questioning to children of the age of two, do you think you might have results different from Table No. 1 in Exhibit CC?

A. I think it is highly likely that they would be entirely——

Q. Very likely, yes. Or if you asked 928 Eskimos who did not understand the English language, you might have different responses?

Mr. Rollins: May I object to it. This is absolutely absurd.

The Court: Yes, I will sustain the objection.

Q. Now will you state why you believe that 928 answers accurately reflect the knowledge——

[fol. 510] Mr. Rollins: That is objected to because it is mere speculation, calling——

The Court: Let counsel finish. Accurately reflect——

Q. The opinion of all persons in Nassau County?

The Court: All the people in Nassau County?

Mr. Grimes: Yes.

Mr. Rollins: I object as mere speculation. This witness

testified his conclusion is based primarily upon the interviews and reports of those interviews, none of which reflect that anyone had a job, had any property, or was eligible for a bank account.

The Court: I will allow the question, but the witness has already answered that question. I am going to allow him to answer it again, and I will tell you almost how to answer it. It is the method that you followed in laying out the poll, is it not, that leads you to the conclusion that you have come to, that is, that by interviewing 928 people you have been able to get a sample of the entire population of Nassau County?

Mr. Rollins: As to knowledge or geographical position?

Mr. Grimes: May we have the answer to that, if you don't mind?

Mr. Rollins: I cannot see any logic in that at all.

The Witness: That is entirely correct. It was the methods that went into the laying out of the sample. [fol. 511] The Court: And let us add to that the execution of those methods.

The Witness: And the execution of those methods.

The Court: That is your answer.

The Witness: Could I add one more statement here? Supplemented by my experience with this type of sampling in previous surveys.

The Court: All right. That is proper to add. That is his answer.

Mr. Grimes: I have just one more question.

Q. May bank accounts be opened for as little as one dollar? If you know.

The Court: You do not have to answer that. The answer is yes.

Mr. Rollins: Your Honor can take judicial notice of the subject. I gave your Honor the case of Slater v. Judd.

The Court: That is the only amount I ever had to deposit. I know it very well.

Mr. Grimes: Just one more question along the same lines.

Q. In this survey you treated everybody in Nassau County as an actual or potential depositor in a bank, did you not?

Mr. Rollins: Judge, I object to that. It is leading the witness, first of all.

Q. As a part of the survey.

[fol. 512] The Court: No, I will sustain the objection, because that is going further than we need to go. The evidence here is that in their method they set up an arrangement whereby everybody in Nassau County had an equal chance to be interviewed. That is what Doctor Chappell said, and he rather adhered to that.

Mr. Rollins: Judge, there is also——

The Court: I do not think we need to go any further——

Mr. Grimes: Very well.

The Court: ——about deposits. Everybody had an equal chance.

Mr. Rollins: First time I ever saw any scientific witness testify that Nassau County has no person who is subject to Welfare, and that is what they ask the Court to take judicial notice of. They say everybody works here and everybody has money in Nassau County.

Mr. Grimes: No such thing was testified to.

Mr. Rollins: In the Welfare Department.

The Court: Are you through with this gentleman?

Mr. Rollins: Yes, sir.

(Witness excused.)

Mr. Grimes: Would this be an appropriate time for a five-minute recess, sir?

The Court: I think so. (Recess.)

[fol. 513]

AFTERNOON SESSION

Mr. Grimes: If your Honor please, my attention has been called to the fact that there are 22 sets of prelisting sheets which I offered in evidence and which apparently were not marked. That followed the stipulation following Mr. Ohnmacht's testimony on the stand. These should be marked in evidence.

The Court: They were offered but not marked; there was some mistake.

Mr. Grimes: I would like to have them marked.

The Court: Let us put them all in evidence under that one exhibit.

Mr. Rollins: I wonder if I interposed my objection.

Mr. Grimes: You interposed your objections to everything. You said it was incompetent, irrelevant, immaterial and hearsay, that these men were not licensed detectives—

The Court: One was offered in evidence. Now let us put the others along with the one under the same exhibit number on the general stipulation that, Mr. Rollins, the witnesses would give substantially the same testimony with respect to the balance.

Mr. Rollins: And all those, of course, are made with respect to the one, Defendant's Exhibit U.

The Court: Now we are ready for the next witness.

[fol. 514] Mr. Grimes: Defendant's Exhibit Q went in separately, your Honor. The others went in separately. They are all of the same category.

The Court: Put them in.

Mr. Grimes: I do not care how they are marked.

The Court: They are not going to receive individual treatment at any time in my judgment about this. Next witness.

Mr. Grimes: This witness has been sworn and is recalled for further direct.

MATTHEW N. CHAPPELL, recalled.

Direct examination.

By Mr. Grimes:

Q. Professor, you heard the testimony of Mr. Brumbach?

A. Yes.

Q. If I asked you the same questions, would your answers be the same?

The Court: Substantially.

Q. Substantially?

A. Substantially, yes.

Q. Are there any differences that you can think of, anything you would like to say?

Mr. Rollins: Your Honor, I did not make an objection, but I will reserve my objections in the form of a motion to strike out his testimony.

The Court: That is right.

[fol. 515] Mr. Rollins: If your Honor will permit me to do that.

The Court: That is right. That runs with all this testimony about the poll, the sample, I should say.

A. I think there is nothing substantially that I would add to it.

Q. Professor, in view of the additional documentary proof which has gone in, and especially what we know as our Exhibit CC, being pages 14 through 34 of the brochure which you prepared, I would like you to express to the Court your opinion as to the method used in the survey and the accuracy of the results thereof as shown on Defendant's Exhibit CC, being the tables.

A. I would say, Judge, that this was the most accurate study that I have ever worked on.

The Court: You would say what you said when you were on the witness stand before?

The Witness: That is correct.

The Court: That, to your knowledge, this is the best form of study that could be devised as far as you know?

The Witness: So far as I know for this study of Nassau County.

The Court: That is in so far as the survey is concerned. What was the other part of your question?

Mr. Grimes: To express his opinion as to the accuracy of the survey.

The Witness: I would say that this study has a very small bias.

[fol. 516] The Court: Without going into detail, has it produced—

The Witness: It has produced accurate results.

The Court: Would you say that those results are as accurate as any that in your experience you could create by any form of sampling?

The Witness: Yes. This is as accurate a form of sample as we could use for this problem.

Q. Thank you. Now I believe you wish to submit in evidence and to the Court a different weighting based upon men and women as an alternative for his consideration, is that correct?

A. That is correct.

Q. You feel it is necessary to do so for the sake of completeness, is that right?

A. For completeness, that is all.

Q. Would you state the reason for that.

A. The reason for this exhibit is that in any form of sampling some people are harder to get hold of than others, and men are harder to get hold of than women. As a result, even when you make five calls on a home you will come up with fewer men than you will women, so that in this sample we had a total of 928 people of whom 522 were women and 406 were men. Actually, the proportion of men and women in the adult population of Nassau County is 49 per cent men and 51 per cent women. The data that is in this report and in Exhibit CC is based on the 928 which we interviewed. [fol. 517] Q. It does include also a breakdown of men and women, is that right?

A. Yes, it includes a breakdown for men and women as well as the total.

Q. Now you want to make a different basis weighted in proportion to the population, is that correct?

A. Yes. Taking the sample of men and the sample of women and giving the men a 49 per cent weight in proportion, which is their proportion in the population, and women 51, I have then computed what the results would have been in answer to questions 1, 2 and 3 for men and women.

Q. In what form do they appear on that document which you have in your hand?

A. They appear on this document in lead pencil beside the corresponding figure which is in that form.

The Court: I think with that explanation you ought to offer this in evidence.

Mr. Grimes: I offer it in evidence, yes.

Mr. Rollins: I object to the offer in evidence upon the grounds it is incompetent, irrelevant and immaterial, and violates the hearsay rule. The opinion expressed therein

is not based upon this witness's own personal knowledge but upon information which is hearsay from others, and the opinion therein expressed is not based upon any hypothetical question put to this witness and is put without any regard to the assumption as to the truth of the competent evidence in the record.

The Court: I will receive it in evidence.

[fol. 518] The Witness: May I make one statement?

The Court: Yes.

The Witness: I started in answer to one question some time ago to remark that there was a slight bias in our results. This corrects the bias. By "bias" I mean that the results might be somewhat different, although we don't know how different they might be, and this shows that there is little or no difference.

(Received in evidence and marked Defendant's Exhibit DD.)

Mr. Grimes: No further questions.

Cross-examination.

By Mr. Rollins:

Q. This form that was submitted to the public generally of the 928 bore printed thereon "Hofstra College Workshop," is that right?

A. Hofstra Psychological Workshop.

Q. That survey was not made for the college, was it?

A. Well—

The Court: How do you mean, "for the college"? No, it was made for the customer, the client.

Q. Was that intended to gain entrance for these interviewers?

A. No.

Q. Were these reports—

A. Was what intended to gain entrance?

Q. These interviewing sheets.

[fol. 519] A. The respondent did not see the interviewing sheets other than as he saw the interviewer writing on it.

Q. What did you get in dollars and cents for your efforts in this case?

A. Is it necessary for me to answer that, Judge?

Mr. Rollins: On the question of credibility.

The Court: I think so, Doctor.

The Witness: All right. Does that mean what was the workshop paid for the total survey?

Mr. Rollins: That is right.

The Court: What did you personally receive?

The Witness: What did I personally get?

The Court: Let us take it this way: You have a regular salary at the institution?

The Witness: I have a salary at the college.

The Court: Did you receive something over and above that?

The Witness: I received something over and above that.

Q. That is all I am interested in, in what you received over. I am not interested in what you get from the college.

The Court: Do you want him to divulge that? Is it important?

[fol. 520] Mr. Rollins: I want to see if it is big enough, and I just want to see if the university of the State here will lend itself to a litigation. I am interested as one of the assistants of the Attorney General.

The Court: All right. I should not admit it for that reason.

Mr. Rollins: No, but I say I would not press it——

The Court: Let me just say this, and then if you want to press the question, you may.

Mr. Rollins: All right, I withdraw the question.

The Court: Where a witness indicates that something is personal and in his judgment he would rather not disclose it——

The Witness: I don't mind disclosing it, Judge.

The Court: It is not necessary.

Mr. Rollins: Since your Honor feels that it should not be done, I will not press it.

Q. You are not a licensed detective, are you?

A. No.

Q. This entire sample survey was under your direction and supervision?

A. Yes.

Q. You had complete charge thereof?

A. Yes.

Q. And you knew, did you not, that when you gave the questionnaires to interviewers to go to the public to obtain the information upon which the report here is based and submitted in evidence, it would be used in this litigation; [fol. 521] you knew that, did you not?

A. I did not know that it would be used in this litigation.

Q. Did you know it would be used in a litigation?

A. I did not know that it would be used in a litigation.

In fact, I—well, I will just say that.

The Court: Just answer the question, that is all.

Q. When was the first time you knew that the data that you obtained and presented in court today would be used in a litigation?

A. After I presented it to the client.

Q. Who was the client?

A. The client—I should say after I presented it to Franklin National Bank. The original client—may I explain that, Judge?

The Court: I think we know it. The original client was the Nassau County Clearing House Association but the poll has been paid for by the defendant in this case.

The Witness: That is right.

Q. What I want to know is the date that you knew that this information you gathered would be used in a civil lawsuit.

A. I can't say the dates.

Q. Approximate month.

A. The month was in December. I would think the date was probably about the middle of December when we first showed the people at the Franklin National Bank the results we obtained.

Q. Who told you to show it to the bank—the defendant in this case?

A. The defendant Nassau County Clearing House said [fol. 522] that we were to deliver copies.

Q. Whom did you speak to at the Franklin Square National Bank of Franklin Square?

A. We spoke to—

Q. Not "we", I am talking "you".

A. I spoke to Mr. Roth, Mr. Green, and also to the counsel.

Q. That is Mr. Grimes, of the firm of Alley, Cole, Grimes & Friedman, the attorneys for the Franklin Square National Bank in this case?

A. Yes.

Q. And that was in December 1950?

A. Yes.

Q. When was your poll concluded or all of your work?

A. It was concluded just about that time. It was about at the conclusion of the poll after we had gotten some results together.

Mr. Rollins: That is all, if the Court pleases. Let the record show that the reason I am not cross-examining this witness is that we have been on trial since two weeks ago, and I believe I have made it apparent from the cross examination of the so-called scientist who collaborated with this witness that there is no basis for the opinion expressed in Defendant's Exhibit CC, and that I believe I established that the information and opinion expressed is not reliable to support any material fact in evidence, and I feel no useful purpose could be served by cross-examining this witness, for if I did cross-examine this witness, my intention would be to adduce the proof established already through the [fol. 523] cross examination of Richard Brumbach, the previous witness, and Willard K. Simmons, the mathematician who testified a few days ago.

The Court: Let that appear on the record.

Mr. Rollins: And rather than waste the time of the Court, if I establish no reliability upon the entire poll for reasons hereafter stated upon my motion to strike out all of the testimony on this poll, I will say to the Court now that I will not cross-examine this witness.

The Court: All right. Any other witness now?

By Mr. Grimes:

Q. Professor Chappell, you understood that the arrangements for the conduct of this poll were originally made with

the president, President Adams, of Hofstra College, did you not?

A. Yes.

Mr. Grimes: No further questions.

(Witness excused.)

Mr. Grimes: Mr. Simmons, please.

WILLARD K. SIMMONS, recalled.

Direct examination.

By Mr. Grimes:

Q. Mr. Simmons, the last time you were on the stand his Honor the Judge asked you about the accuracy of the methods of determining this poll and whether you [fol. 524] had done so. Now, have you done so since that time in connection with two specific figures on that poll which would illustrate the method of determining accuracy of the Hofstra survey?

A. Yes, I have.

Q. Would you now, please, answer the Judge's question put to you two days ago by way of illustration and in as simple terms as the subject permits.

A. May I see a copy of the report please, if I can call attention to the two figures I used. (Handed to Witness.) Your Honor, we calculated with assistants, and I checked the work, to develop the margin of error which you requested last time or asked if I had done last time for the figure 85.8 which appears here in Table I for the persons making accurate statements regarding savings accounts, and similarly for thrift accounts, except that in that case we took the sum of two percentages here for persons making accurate statements or persons who say it is the same as a savings account—in other words, for the persons making accurate statements it is 7.8 per cent; for those who say it is the same as a savings account it is 11.7. The total then is 19.5, and it is that percentage, 19.5, and the 85.8 for which these two margins were computed. The error margin for

the former, the 85.8 per cent, came out to be 2.6 per cent, and by way of interpreting that in a standard way as it is used in statistics it would be construed to mean that the chances are less than one in three that had the survey been conducted throughout Nassau County not on a sample basis but asking every adult defined in the population under study the questions in exactly the same way they were [fol. 525] here and under the exact procedure—otherwise the same question and everything else except with respect to the sample, the sample would not be limited—why, the chances I would say then are less than one in three that we would have gotten an answer which would have departed from 85.8 per cent by more than 2.6 per cent.

Q. In other words, that would be the departure on either side?

A. And the most probable figure would be 85.8, but to say, of course, that you would get exactly the same, there is almost no chance of getting any one single figure, if you carry it out far enough, but the most probable figure is your 85.8, and if you take a range around it on either side, 85.8 plus 2.6 and 85.8 minus 2.6, the chances are two out of three that the figure for the entire county would be within that range. Now, that would be called one margin of error, they call it, or one standard deviation from the error margin. If we doubled that percentage 2.6, making it 5.2, then the odds go way up. The chances there would be 19 out of 20 that you would not miss your 85.8 by more than 5.2 percentage points in either direction. Similarly, for the three standard errors here, that is your 2.6 percentages margin times 3 gives you 7.8 per cent, and on the basis of sampling errors there we could say that the survey conducted throughout the entire county not on a sample but on a total basis would lie somewhere within the range 85.8 plus the 7.8 to 85.8 minus 7.8 per cent. Now, the other percentage I just mentioned, the 19.5—

Q. What are the odds there?

A. Oh, I did not mention that. The odds there are three [fol. 526] out of a thousand, that is, three out of a thousand that you would exceed the range, and 997 out of 1000 that you would fall within the range.

Q. Within that range of three sigmas?

A. Three sigmas, yes.

Q. Repeat the process now on the 19.5 figure.

A. All right. Will it suffice perhaps to say that the sigma there was 2.1 instead of 2.6, and twice the 2.1 would give you 4.2. In other words, in that case the odds would be 19 out of 20, better than 19 out of 20, that you would lie within the range of 19.5 minus 4.2 to 19.5 plus 4.2. Then your three sigma level there is 6.3 per cent, and there the odds go up to 997 in a 1000, the odds being 997 out of 1000 that your true value would be 19.5 plus or minus 6.3 percent, percentage points in this case.

Q. Have you finished?

A. Yes, I think that is it.

Q. You gentlemen who are experts in this field have used the term "bias" and "estimate" throughout your testimony. Would you explain what persons in your field mean when they say "bias."

A. Yes. The term "bias"——

The Court: We have that in the record.

Mr. Grimes: All right, sir.

The Court: Doctor Chappell gave us that.

Q. Would you explain what the term "estimate" means as persons in your business use that word.

A. Well, an estimate in this case means what it means normally except with regard to its precision and the implication of precision that go with it. For example, if we were able to make this fine survey we just talked about and talked to everybody in Nassau County, we would come out with a percentage.

Q. That would be exact?

A. That would be exact.

Q. That is what you call the true value?

A. That is the true value, the true population value.

Q. When you take less by way of a sample, you call the result an estimate?

A. An estimate. And if you take your sample scientifically, then you can say your estimate will be correct within the range of the error margin as computed.

Q. And just as you have given it.

A. That's right.

Q. And that is what you mean by "estimate"?

A. Yes.

Q. Not guesswork?

A. No. That is well-established in statistical theory.

Q. It is a very close approximation of the true value?

A. A very close approximation.

Q. Differing only because you did not take the census type of survey?

A. Indeed.

Q. Is that correct?

A. Yes.

Q. You have conducted many surveys and participated in many surveys, is that not true?

A. Yes, I have.

Q. And being a consultant on this particular survey, you are familiar with all steps taken, whether you took them or not, are you not?

A. Yes, I am familiar with them.

Q. And the results?

A. Yes, I am.

Q. Now would you express to the Court your opinion, based upon your experience, as to the methods used in this survey and the accuracy of the results attained?

[fol. 528] Mr. Rollins: If your Honor please, I think there are two questions.

Mr. Grimes: There are.

The Court: There are two questions but the other witness answered the same.

Mr. Rollins: I object to the latter part of the question, which tends to obtain an opinion upon the survey made—namely, that the survey tends to show by inference and examination of Exhibit CC that most of the people in Nassau County in the proportion enumerated in Defendant's Exhibit CC do not have a knowledge in particular of the three trade terms—thrift account, special interest account, and compound interest account.

The Court: I do not think you ought to limit your objection to that. I think your objection ought to be wider and let it cover every figure contained in the exhibit in so far

as this gentleman gives his opinion. But, remember, his opinion now is only based upon Defendant's Exhibit CC.

Mr. Rollins: In effect, giving verification thereto and expressing his own opinion thereon.

The Court: No, his opinion is given as to Defendant's Exhibit CC with respect to the methods pursued in producing that exhibit.

Mr. Rollins: And the results obtained.

The Court: That is one, and the other is the accuracy of the results obtained. He is only giving his opinion as to those things.

[fol. 529] Mr. Rollins: Indirectly thereby ratifying what is already said with reference to this. So I therefore object to the question, your Honor, on the ground—

The Court: I will allow it.

Mr. Rollins: —that it is incompetent, irrelevant and immaterial and tends to violate the hearsay rule. Then, again, it is an attempt to obtain expert opinion on matters which are not in evidence, certainly not within the personal knowledge of this witness, and must be primarily based upon information given to him through the interviewers obtaining their information from persons, which is hearsay, and I say that an opinion of an expert can only be expressed from the witness's personal knowledge or upon a hypothetical question based upon matters in evidence, and I say the question is improper and incompetent, and upon the other grounds specified I object to the question.

Q. Will you please confine your answer to my question to the matters in evidence.

The Court: Do you understand the question?

The Witness: I am not quite sure.

The Court: The question simply is this: Give your opinion by reason of your long experience, education and so forth, in this line of work as to the methods pursued in this poll and as to the accuracy of the results attained. What is your [fol. 530] opinion? In other words, could it have been done in a different way which would have produced better results, with better methods employed, or is this the best method you know of?

The Witness: All right, I would say that this survey has

been done by what I would consider to be an extremely high standard of survey design, sample design, and administrative control, so far as I have gone through the entire thing with respect to sample and knowing generally operation throughout. To be sure, there is a wide range of possible methods that might have been used in sampling and other things. This would seem to be more than adequate. I consider it to be a highly satisfactory plan set up here to produce estimates which would come within a range of error which would come almost for certain, within the extremely high odd, within a range of error necessary for the purpose that it was set out to produce.

Mr. Rollins: I do not think it is a proper answer. He did not answer your Honor's question. He says it is a good one but he did not say if there is a better one.

The Court: He can only answer what he thinks. Now, with respect to the accuracy of it, will you state your opinion. That is the same question.

The Witness: My opinion is that it would seem to me almost beyond belief that the percentages [fol. 531] shown here should deviate more than a two or three sigma error margin. It would just be out of this world for that to happen as I see it.

Q. Then would you say that the accuracy of this poll—and the methods therein pursued which have produced these figures—in your opinion is an accurate poll?

Mr. Rollins: That is objected to, if the Court please, upon the grounds incompetent, irrelevant and immaterial, and does not take in a hypothetical question based upon matters in evidence, and violates the hearsay rule.

The Court: I will allow it.

A. It is.

The Court: It has produced an accurate result?

The Witness: I consider it an extremely accurate poll and extremely accurate result.

The Court: All right. That is his opinion.

Q. Your answer has been based upon your knowledge of each step in the method used in the poll, is that right?

A. To be sure.

The Court: The entire method. He is familiar with it and he has based it all on the method. I put that in my question. [fol. 532] Mr. Grimes: I want to make that very clear. May we have Defendant's Exhibit CC here.

Q. There are already in evidence pages 14 through 34. Would you look at the first part. You are familiar with the first part of Defendant's Exhibit CC, starting with the flyleaf and going down through the purpose, the method, the sample, and the explanation?

A. Yes, I am familiar with that.

Q. The summary of results, you are familiar with that?

A. Yes.

Q. Would you say that this is a fair and concise statement of the summary of the results?

A. Yes, I would say it is a fair summary.

Q. And of the method used?

A. And of the method, yes, sir.

Q. And whatever is stated under the various descriptions here?

A. Yes, to be sure.

Mr. Grimes: Now, if it pleases the Court, I am going to offer the pages 1 through 14 in evidence not for the truthfulness of what they say, not on that theory—although we maintain that they are truthful—but as a summary of the testimony of Doctor Chappell, Mr. Brumbach, and Mr. Simmons.

Mr. Rollins: That is objected to, if the Court pleases, as an attempt to get in evidence a record not under oath.

The Court: I will have to sustain the objection. [fol. 533] Mr. Grimes: Sir, it is offered on the theory of an accurate summary of testimony.

The Court: I have to sustain the objection.

Mr. Grimes: Very well.

The Court: We have the testimony.

Mr. Grimes: I am sure you have the power to do it. Very well, sir. That is all. Thank you.

Mr. Rollins: No questions.

(Witness excused.)

WILLIAM J. BOYLE, residing at 10 Croydon Drive, Mer-
rick, New York, called as a witness in behalf of the defend-
ant, being duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. What is your occupation, Mr. Boyle?

A. Banker.

Q. What bank?

A. Franklin National Bank, Franklin Square.

Q. What is your position there?

A. I am vice president in charge of the installment loan
department, or as it is commonly known, the consumer
credit department.

Q. How long have you been vice president of a bank?

A. I have been a vice president approximately two years.

Q. How long have you been in charge of the installment
loan department?

A. About five and a half years.

[fol. 534] Q. There has been testimony here that in the
summer of 1947 a new alteration or addition or a new
building was built, and in reference to that where was the
installment loan department located from the time that
new addition was built?

Mr. Grimes: For the record I would like to say that has
been referred to as building No. 2 on one of the plaintiff's
exhibits.

Q. You have been in court during this trial, have you not?

A. Yes, I have.

Mr. Grimes: If we could have the exhibit—

The Court: We do not need it. Tell us, was it in building
No. 2?

The Witness: We moved the department into building 2
before the building was officially opened.

The Court: Whereabouts in building 2? What floor?

The Witness: It was on the ground floor, in the rear of
the building.

The Court: All right. That is the answer.

Q. And it has been there since this addition was put on, has it?

A. That is correct.

The Court: He just said that.

Mr. Grimes: I am sorry, I did not hear that.

Q. Briefly, what is the installment loan department; what services does it render?

[fol. 535] A. The installment loan department makes loans to consumers repayable on an installment basis in amounts up to \$5,000 to purchase consumer goods or services.

Q. Could you name a few of the types of goods and services purchased by consumers under the installment loan method?

A. Well, some of the goods purchased would be automobiles, boats, airplanes, white goods, such as refrigerators, stoves.

The Court: All right. That is enough. He just said some. Similar things.

The Witness: And similar things.

Q. As of the time this present action was brought against the Franklin Square Bank, what banking services were rendered by the bank in what is known as the family lobby?

A. Well, there are many services, if I may refer to the list here, they are so varied and diversified.

Q. I think you may.

Mr. Rollins: We got that from the examination before trial when Mr. Roth testified and I read it into the record. It is merely repetitious.

The Court: I thought we had it.

Mr. Rollins: In the examination before trial, yes. I read it in.

The Court: Mr. Grimes, what is the purpose of this testimony? I thought we had all the testimony on location of activities within the bank.

Mr. Grimes: There is one other purpose.

[fol. 536] Q. Are you familiar with the employees in the bank, as to the number of employees engaged in the various departments on the ground floor in the family lobby.

A. Yes, I am.

Q. Will you state the number of employees classified by the occupation they perform or the departments they are in?

A. Well, in the family lobby there are 21 persons employed in the installment loan department, there are 6 people in the savings section, there are 4 persons in the special checking account section, and there are 3 persons in what we call the new account section.

Q. Have you figured out the percentages as regards the number of employees in the installment loan as against savings and the other departments?

Mr. Rollins: That is objected to, if the Court pleases, as calling for an opinion of this witness.

The Court: I will sustain the objection. The figures are there. The percentages can be computed.

Q. The next question that I am going to ask bears upon the charge of deliberate intent to misrepresentation. Did you, Mr. Boyle, about the time of the opening of the family lobby describe in a publication the character of the Franklin Square Bank?

A. Yes, I did.

Q. What publication did you write an article for?

A. I wrote an article for the July issue of the Midcontinent Banker.

Q. I show you a document and ask you whether this is the article.

A. Yes, this is the article. Correction, that was [fol. 537] the August issue, August 1947.

Q. Published about the time of the opening of the new lobby, is that correct?

A. That is right.

Q. Does that article truly and accurately represent the purposes of the family lobby and its exterior and interior design and decoration?

A. Yes, it does.

Mr. Grimes: I offer it in evidence.

Mr. Rollins: That is objected to, if the Court pleases, as self-serving, matters of fact for the Court to determine.

The Court: Must be sustained.

Mr. Grimes: Fraud, sir, and deception are charged here.

The Court: Yes, I understand the purpose of your offer and the authorities which allow it in, but I am going to exclude it.

Mr. Grimes: I most respectfully except to your Honor's ruling.

Q. Is the family lobby used for display purposes of many wares, goods and merchandise of many items?

A. Yes, it is.

Q. Has that been the case since it was built?

A. Yes, since July of 1947. I don't think there has been a month that there hasn't been various items on display in the lobby.

Q. And on the opening of the lobby there was an airplane on display, a large part of one, was there not, an airplane minus one wing?

A. That's right.

Q. You have had automobiles on display there?

A. That is correct.

[fol. 538] Q. Many other like items?

A. That is correct.

Q. All of which are purchased by installment loan or may be purchased by installment loan, is that correct?

A. That is correct.

Q. Has the Franklin Square Bank ever held itself out to the public to be or pretended to be in any way a savings bank?

A. No, it hasn't.

Q. As a matter of fact, the present savings alcove was not even in the family lobby of the bank when the family lobby was originally built, was it?

A. That is correct.

Q. About how much later was it constructed?

A. I'd say it was completed at least a year and a half after the new addition was put onto the building.

Mr. Grimes: Now we have a document which was marked for identification, being the ground plan prepared by Mr. Carlson.

Q. I show you Defendant's Exhibit B for identification and ask you to examine the various designations as to the services rendered in the various parts of the ground floor of the family lobby and ask you whether or not these designations accurately represent the banking functions done at the bank in the particular locations which the designations indicate.

The Court: You have seen that before, have you not, Mr. Boyle?

The Witness: Yes, I have.

The Court: You can use your former knowledge. Does it do that?

[fol. 539] The Witness: This indicates the space allotted to the various services in the family lobby.

The Court: That is what counsel asked you. Yes, he says it does indicate.

Mr. Grimes: I offer it in evidence.

Mr. Rollins: No objection.

(Received in evidence as Defendant's Exhibit B.)

Mr. Grimes: No further questions.

Cross examination.

By Mr. Rollins:

Q. Mr. Boyle, I show you a printed copy of what purports to be a financial statement of the defendant Franklin National Bank of Franklin Square, as of December 31, 1950, and ask you whether the same was caused to be printed and circulated publicly by the defendant?

A. Yes, this is our published annual statement.

Q. Does the financial statement and figures reflect the true and accurate condition of the bank, the defendant in this action, its growth for the periods 1950, 1949, and 1948, respectively?

A. Yes.

Mr. Rollins: I offer it in evidence.

The Court: No objection to the bank's statement, is there?

Mr. Grimes: No objection.

(Received in evidence and marked Plaintiff's Exhibit 36.)

Mr. Rollins: Does your Honor want to look at [fol. 540] the growth of that bank? They claim they have been frustrated.

Mr. Grimes: Do you suggest that proves we have not been?

The Court: Let us not get into that now.

(Witness excused.)

CHARLES W. GREEN, residing at 88 Delmar Avenue, Franklin Square, New York, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Grimes:

Q. What is your occupation, Mr. Green?

A. Vice president of the Franklin National Bank.

Q. How long have you been vice president of that bank?

A. Since October of 1947.

Q. Would you state what your education is first, and following your education, what your experience and work has been in the field of business, sales, public relations and banking, starting right from the beginning.

A. Graduated from Parker High School of Dayton, Ohio; had two years of college work at the University of Dayton, spent about eighteen months in the service the first world war; returned to a connection with the National Cash Register Company of Dayton, taking training in sales and promotion work; spent a year with National Cash Register Company as a salesman; left to go over to the International Business Machines Corporation, the Food Store Division, [fol. 541] and was with them from 1920 through 1938, at which time I became a distributor for the Allied Store Utilities Corporation, in New York.

Q. What was the character of your work with International Business Machines Company?

A. Sales.

Q. Were you with sales, or what type of field?

A. Sales, sales promotion, market analysis. Began as a salesman, became assistant divisional sales manager, then

divisional sales manager, then the manager of the national chain store division, and later sales manager in the metropolitan area of New York.

Q. In connection with your occupations, first as to sales, and any other positions you may have had, have you taught salesmanship?

A. I have. I taught sales courses with International Business Machines Corporation and also regional sales courses for the various divisions.

Q. Have you dealt in the subject of advertising? Did you while you were with Business Machines Corporation?

A. Yes.

Q. To what extent?

A. From the study of the various divisions—I am speaking now of geographic divisions—determined the types of advertising which would convey impressions of product and influence choice to the purchase of the equipment which we manufacture.

Q. Did you also serve on the Committee of Economic Development?

A. I did.

Q. During what year?

A. 1944. The directors of our institution loaned me to the Committee for Economic Development.

Mr. Rollins: If your Honor pleases, all this is very interesting but I do not see what the purpose of it is.

[fol. 542] The Court: I think the qualifications have gone far enough. On the question of qualifications, I think that, as far as the issues in this case are concerned, the witness has stated his experience sufficiently now.

Mr. Grimes: Very well, sir.

Q. Have you also served as Director of Public Relations for the American Bankers Association?

Mr. Grimes: If I may be permitted to ask just that one additional question.

A. Yes, I have for a period of a year and a half.

Q. Then you returned to Franklin National Bank?

A. That's right.

Q. When did you first go with the defendant bank?

A. In January of 1943.

Q. And your present position there is vice president and director of public relations?

A. That's right.

Q. It has been testified here that savings banks and other types of banks do considerable advertising. Is it true that among your duties in your position is the duty of watching the advertising of other banks?

A. That is true. That is a large part of my duty.

Q. Before getting into advertising, in your observation and your experience and in your opinion is the Franklin National Bank in competition with other banks and financial institutions?

A. It is definitely in competition with all other financial institutions.

[fol. 543] Q. What about savings banks in New York?

A. In competition with them also.

Q. In what way?

A. Because the savings banks in New York City, as well as other areas, are attempting to attract deposits from all segments of population in the area, and because of their efforts to attract these deposits, heavy emphasis is placed on advertising which places us in direct competition.

Q. What are the forms of advertising that they use, the New York City savings banks?

The Court: To accomplish that last result?

Mr. Grimes: Yes.

A. Not all of them use all of the complete list, but the complete list is used by all or some of them: newspaper advertising, direct mail, billboards, car cards, radio, television, the distribution of football scores, baseball scores, the lending of umbrellas on rainy days—all come under the category of advertising which is used extensively by a great many banks as advertising media.

Q. Is your answer confined to savings banks located in New York City?

A. No. That includes all banks located in New York City and other financial institutions as well.

Q. Is the defendant bank in competition, in your observation and experience, with other commercial banks?

A. In direct competition, yes.

Q. Do they also advertise?

A. They do.

Q. What would you say as to the extent of the competition that the Franklin Square Bank has with other commercial banks?

A. You mean in dollar volume, or advertising, or what? [fol. 544] Q. Would you characterize it as keen competition?

A. Extremely keen competition.

Q. And there is one savings bank in Nassau County, is that correct?

A. That's correct.

Q. Are you in competition with that, sir?

A. We are.

Q. Now will you state the degree of competition between the defendant bank and savings and loan associations, whether located in Nassau County or elsewhere.

A. Competition between our bank and savings and loan associations is extremely keen not only in Nassau County but in the metropolitan area, as well as from foreign States across the continent.

Q. Do the various types of financial institutions, competitors of yours, as you described them, advertise in Nassau County and in journals that reach Nassau County?

A. They not only advertise in Nassau County papers, but they use the metropolitan press, which is circulated in Nassau County.

Q. Now I show you a group of documents and ask you whether or not these are, to your personal knowledge, advertisements placed in various newspapers by the competitors which you have described.

A. They are.

Mr. Grimes: I offer them in evidence.

Mr. Rollins: I object to these, if the Court please. It deals with advertising by savings banks and savings and loan associations, Federal and State.

The Court: Let me see them a moment.

Mr. Rollins: I contend they are incompetent, irrelevant and immaterial.

[fol. 545] The Court: I will receive them in evidence.

(Received in evidence and marked Defendant's Exhibit EE.)

Q. Is advertising by these competitors of the Franklin Square Bank on the increase?

A. It is on the increase.

Q. And has been for some time?

A. That is correct.

Q. And some institutions offer a higher rate of interest or pay for money deposits than others, is that right?

A. That is correct.

Q. From what quarter, if you can state, do you feel the competition for deposits or investments, whatever they are called—the type of situation where people put money into a financial institution and expect some return on it—comes?

Mr. Rollins: That is objected to on the ground there is no basis for the opinion.

The Court: Sustained. Mr. Grimes, how many more witnesses did you propose to call?

Mr. Grimes: I think just Mr. Roth, sir.

Mr. Rollins: I am not going to cross examine this witness at all.

Q. Mr. Green, what types of financial institutions offer the service whereby they agree to pay a return, whether they call it interest or dividends, for deposit of people's money?

The Court: We have that, surely, in the record.

[fol. 546] Q. What terms are used by these competitor institutions of the defendant bank?

The Court: Do you mean in those advertisements?

Mr. Grimes: No, by competitors in general, including the advertisements.

The Court: All right.

A. They use the term savings accounts, savings bank and savings and loan associations, and the commercial banks, use other terms, such as compound interest, special

interest, thrift accounts, and even a combination of the three, compound interest thrift accounts.

Q. In your capacity as director of public relations and as vice president of the bank, have you studied the problem of advertising for some time, some number of years?

A. I have studied it intently.

Q. What is your opinion as to the efficacy, that is to say, the usefulness in advertising purposes of these various terms that are used by these various banks?

Mr. Rollins: That is objected to, if the Court please.

The Court: I am going to sustain the objection to that question. I think that is a question for the Court to determine ultimately.

Mr. Grimes: My question at this point, your Honor, is designed to elicit from him whether they have equal drawing power or not equal drawing power.

The Court: I think it is a dangerous question for the [fol. 547] defendant to ask, because of its being the major issue in the case. I do not think it should be answered by a witness, even an expert.

Mr. Grimes: Your ruling, sir, leaves me at a little loss to know how to proceed. May I inquire as to whether in his observation people understand these various terms?

The Court: I would say no, I would not do that, because whatever you do in that affirmative manner, I must allow the Attorney General to negative it by calling other people to give the same views, and I do not think individual views have any basis in a proceeding of this kind. I think you put forward the facts and I have allowed the poll evidence to go in, which is hearsay, and then it is for the Court to determine these other questions.

Mr. Grimes: I trust when you say it is hearsay, it violates the hearsay rule—

The Court: I am not saying it violates the hearsay rule. If it did, I would not allow it in evidence. I say it is hearsay; it may be hearsay but an exception to the rule. I say you can develop the facts from which the Court can draw the conclusions, but I do not think that the subject matter is a proper one to ask individual witnesses their opinion or their observations with respect to those four terms.

Mr. Grimes: I am asking him, sir, actually as an expert.

The Court: Even as an expert, I do not think it is admissible.

[fol. 548] Mr. Grimes: I feel I must except to your Honor's ruling.

The Court: Yes, take an exception.

Q. Did you, prior to any discussion by you or anyone else as to the advisability of having Hofstra College make a poll or a survey as to the understanding of the four banking terms testified to by people in Nassau County, yourself make an informal poll of any sort?

A. I did.

Q. Was the Hofstra survey made after you made the informal poll?

A. It was.

Q. What did your informal poll consist of?

Mr. Rollins: That is objected to, if the Court please.

The Court: I must sustain the objection to that.

Q. What is the banking area, if that phrase is sufficiently definite, the principal banking area of the defendant bank?

A. Nassau County.

Q. Do you regard all persons in Nassau County as potential depositors in or dealers with the bank?

Mr. Rollins: That is objected to, if the Court please.

The Court: It is harmless. I think I will allow him to answer.

Mr. Rollins: The whole State of New York, he expects business. He won't refuse it.

The Court: We will allow that one.

A. I do believe that every person in Nassau County is a prospect.

[fol. 549] The Court: So does every other bank.

Mr. Rollins: Forty-six of them. That is what they call competition.

Q. Have you an opinion as to the approximate percentage of the total bank's business which is done with persons, firms or corporations in Nassau County as regards the savings deposits of a bank?

Mr. Rollins: Which bank are you talking about?

The Court: His bank.

Mr. Grimes: Yes, his.

Mr. Rollins: In relation to what is that?

The Court: The percentage of banking.

Mr. Rollins: In the whole county?

The Court: Yes.

Mr. Rollins: I object to it, if the Court pleases; not within the knowledge of this witness. It would be hearsay.

The Court: I think I will sustain it.

Mr. Grimes: My question is, what ratio does the amount of savings deposit business done by the defendant bank in Nassau County bear to that done outside of Nassau County?

Mr. Rollins: You mean by this defendant bank?

Mr. Grimes: Yes.

The Court: All right, can you give us that? That is confined to deposits, reception of deposits?

Mr. Grimes: Yes, sir.

The Witness: I would say 95 to 97 per cent.

[fol. 550] Mr. Rollins: Are we talking about time deposits or both?

Mr. Grimes: Savings deposits.

The Witness: 95 to 97 per cent of it comes from within Nassau County.

Mr. Grimes: You may examine.

Mr. Rollins: No questions.

(Witness excused.)

COLLOQUY

Mr. Grimes: Mr. Roth, please.

The Court: I do not think we are going to take Mr. Roth for tonight. I think we had better let that go until tomorrow morning. Did you have any witnesses you want to call?

Mr. Rollins: No, sir. Those are all my witnesses. I think I anticipated everything they intend to prove.

The Court: It is rather late, so perhaps we ought to recess. We will have to devote some time tomorrow to this, at any rate.

Mr. Rollins: If your Honor pleases, may I at this time

request that Plaintiff's Exhibit 16 be substituted by a photostatic copy thereof. It is the authority conferred upon Mr. Seaton, and by keeping it as a court record he would not have his credentials. Mr. Roth of the defendant bank was nice enough to have it photostated.

The Court: No objection?

Mr. Grimes: None whatsoever, and we would like to make the same request about all of our exhibits.

Mr. Rollins: I have no objection.

Mr. Grimes: You have no objection to that, have you?

Mr. Rollins: No objection.

[fol. 551] (Trial Continued.)

Mineola, New York,

February 2, 1951

Mr. Grimes: Judge, we have had prepared really for the Court but also for our own purposes some very large charts, known as bar charts in the trade, which show the percentages in graphic form, that is, bars of different colors, as to who knows what and who does not know what, to represent the results of the Hofstra poll. The record is voluminous and the exhibits are voluminous. My thought is this: We are quite prepared to offer them in evidence as a graphic representation of whatever has been testified to already, and will, if the Court thinks it will be helpful. They are very easily followed. If the Court feels it would be helpful, perhaps with the Court's and counsel's permission, I would like to show a sample.

The Court: Yes, would you mind letting me see them, because they may be of some help even to the Attorney General.

Mr. Grimes: My man must have taken them for checking purposes at the moment. I thought if your Honor cared to have them, I would recall Doctor Chappell who I expect will testify that he has checked the charts against the percentage figures and that they jibe and are accurate, and offer them in evidence.

The Court: I do not think you need to call Professor [fol. 552] Chappell just to give that.

Mr. Rollins: Judge, I do not think you need it. If it

were a jury, it would be a different story. It will only be a replica of Defendant's Exhibit CC.

The Court: My thought about it is this, Mr. Rollins, and I will let you somewhat decide it. You have opposed the taking of the evidence of this poll, first on the general ground that it violates the rules of evidence to receive it at all, and secondly by your cross examination—in the event that that is resolved against you—I notice you have tried to establish that it is not valuable as a reflection of the knowledge of the people of Nassau County.

Mr. Rollins: This is a State law.

The Court: Yes.

Mr. Rollins: It is sixty-two counties. That is only one county.

The Court: I notice from your cross examination in the event that the poll was received that you have endeavored to show that it is not an accurate reflection and for that reason it is not valuable. Now I would like you to have the benefit of these charts, to look at them before they are offered in evidence, because they may demonstrate your point.

Mr. Rollins: Judge, the stipulated figures of counsel and myself, which are not before your Honor, belie the alleged scientific statement on that.

The Court: Aside from that, if these charts would serve your purpose——

[fol. 553] Mr. Rollins: Wouldn't help me.

The Court: ——and Mr. Grimes wants them in evidence, then I would receive them.

Mr. Rollins: It is just a matter of general knowledge.

The Court: Then I think, Mr. Grimes, as long as the Attorney General seems to think he does not want them, I would have to exclude them, because they are simply an amplification of what is already in the word picture.

Mr. Grimes: That is true, sir. It says the same thing in a different and we think more graphic manner.

The Court: Yes. Now, the Attorney General objects, and I think he is on sound ground when he objects, to the Court's receiving something which merely amplifies the testimony already before us. So, we will leave that out.

Mr. Grimes: All right, sir.

Mr. Rollins: I think the graphs there as part of Defendant's Exhibit CC state in percentages. They could not add any more than what is there.

The Court: That is my disposition of that.

Mr. Grimes: Shall we proceed now?

The Court: Yes.

Mr. Grimes: Mr. Roth.

[fol. 554] ARTHUR T. ROTH, residing at 344 Harvard Avenue, Rockville Centre, New York, called as a witness in behalf of the defendant, being duly sworn, testified as follows;

Direct Examination.

By Mr. Grimes:

Q. Mr. Roth, you are President of the defendant bank?

A. I am.

Q. How long have you been president of that bank?

A. Approximately four years.

Q. Would you go back, please, and state your education and banking experience.

A. I graduated from the Townsend Harris High School in 1923. I attended the Walton School of Commerce, in New York City, which was a school of accountancy. I attended the American Institute of Banking, and I am a graduate of the Graduate School of Banking, American Bankers Association, Rutgers University.

Q. How old are you, Mr. Roth?

A. Forty-six.

Q. Now would you state what your banking experience has been.

A. After leaving high school I became employed with the Columbia Bank, New York City, which was absorbed by the Manufacturers Trust Company about a year later. I remained with Manufacturers Trust Company until 1934, when I took a position with the Franklin Square National Bank, as it was then known, as cashier.

Q. What year was it that you went to work for the Columbia Bank?

A. 1923.

Q. Would you state briefly, please, your experience and your positions in the Columbia Bank and later with Manufacturers Trust Company?

[fol. 555] A. Messenger, check clerk, statement bookkeeper, Boston ledger bookkeeper, general bookkeeper, collection clerk, note teller. Then I was transferred to the main office of the Manufacturers Trust Company to the Comptroller's Department where I was in charge of a number of departments in all of the branches of Manufacturers Trust Company, including note tellers, collection, general bookkeeping.

Q. Did you do special work for the bank in connection with their acquisitions of other banks, that is to say, Manufacturers Trust Company?

A Yes. Whenever there was a merger, whenever Manufacturers Trust Company took over another bank, I was assigned to one of the branches of the bank being taken over to see that their operations and systems were converted to conform with that of Manufacturers Trust Company.

Q. Mr. Roth, you have been in banking, then, from 1923 to date?

A. That is correct..

Q. During the course of your banking career have you read extensively or otherwise various treatises on banking?

A. Yes, I have.

Q. To what degree have you read them, if you could characterize the extent of your reading?

A. Well, I would say that well over half of all my reading has had to do with banking subjects. I have read various banking books and all of the leading periodicals and trade papers having to do with banking.

Q. Do you read those periodicals and trade papers currently?

A. I read them currently. I guess I read them practically every day in the week.

Q. Would it be fair to say that your reading on banking [fol. 556] subjects has been extensive?

A. Yes, that would be fair.

Q. Have you written articles for banking journals dealing with banking?

A. Yes, I have.

Q. Would you state a few, please.

A. I have written articles for the American Bankers Association publication, a trade publication called Banking, for the United States Investor, for the American Banker, and for various other periodicals.

Q. Have you on occasion been asked to and have you addressed meetings of bankers and conventions of bankers?

A. Yes, I have.

Q. Could you state a few of those occasions, please.

A. I have addressed conventions, the American Bankers Association, New York State Bankers Association, New Jersey Bankers Association, local clearing house associations, groups of bankers in Pittsburgh and a number of other places.

Q. Ohio?

A. Ohio, yes.

Q. These addresses were on banking subjects, is that right?

A. All on banking subjects.

Q. Mr. Roth, just for the record, where is the main office of the Franklin National Bank of Franklin Square located?

A. Hempstead Turnpike, Franklin Square.

Q. How far is that from the New York City line, that is, the outer limits of New York City?

A. Approximately three miles.

Q. How far is that from the heart of New York City, say, Times Square?

A. Approximately fifteen miles.

Q. How long have you been a director of the defendant bank?

A. Over ten years.

[fol. 557] Q. You testified you went there as cashier in 1934. Would you please outline briefly the progress that you have made by way of office holding since that time.

A. Cashier, vice president and cashier, executive vice president and cashier, and then president.

Q. You have read the complaint in this case?

A. Yes, I have.

Q. You have noted the charge that your bank used the words "saving" and "savings" in its signed circulars, stationery, bank forms and advertising media, which was calculated to and had the tendency and effect of leading the public to believe that the defendant bank was incorporated as a savings bank. Is that charge true or false?

Mr. Rollins: That is objected to. It is for the Court to determine from the evidence as a matter of law.

The Court: I think your question ought to be, Did you intend that situation to develop from the use. Then I think the witness could answer that.

Mr. Grimes: Very well, I will accept the Court's suggestion.

Q. Did you or your bank intend in any way to lead the public to believe that your bank was or is a savings bank?

A. No.

Q. In so far as you know, did any conduct upon the part of your bank whatsoever tend to have that effect?

Mr. Rollins: That is objected to, if the Court please. It is a matter for the Court to determine as the trier of the facts.

[fol. 558] The Court: I will have to sustain the objection, if you mean that effect on the public.

Mr. Grimes: On the public.

The Court: I will have to sustain the objection. Mr. Roth cannot tell the public mind.

Mr. Grimes: Very well, Judge. He certainly might know if it had an effect. The question is, as far as he knows did it have any such tendency or effect.

Mr. Rollins: That is objected to.

Mr. Grimes: That can arise in a number of instances.

The Court: He can give the facts and then the Court will draw the conclusion whether it did have that effect.

Q. Do you know of anyone, sir, who has at any time ever, by words or conduct or writing in any way, in so far as you know, indicated that that person or any other person thought that your bank was a savings bank?

Mr. Rollins: That is objected to, if the Court pleases. Calling for the operation of some other person's mind. The entire question is for your Honor's determination from the evidence adduced.

Mr. Grimes: The question is asked: the conduct that he has observed in any way on the part of anybody anywhere.

Mr. Rollins: He certainly could not tell that by looking at anybody.

The Court: I think I would have to sustain the objection on account of the question being so broad. I [fol. 559] think under these circumstances Mr. Roth ought to be allowed to answer, have any complaints been made to him or to the bank that they are conducting a savings bank. I think he ought to be allowed to answer that question. Then from that maybe you could develop a further line of similar questions. But when the question is as broad as to say any conversations or remarks or anything you heard at any time, I do not think that meets the issue.

Mr. Grimes: If that is the basis of the objection, I will rephrase the question in this way.

Q. Mr. Roth, have you observed any action on the part of anyone which indicated that they thought that your bank was a savings bank? That calls for observation of an action on the part of anybody.

Mr. Rollins: That is objected to, if the Court pleases. In the first place, as a matter of fact, that never could occur.

The Court: I will sustain the objection because the action would be prompted by the person's thought and then Mr. Roth would be in a position of trying to interpret what that thought was.

Mr. Grimes: If your Honor please, I am just going to make one more observation. Where fraud and deception are charged, as here, the usual rule as to self-serving declarations or other rules that ordinarily apply have no [fol. 560] application and a person is allowed by the courts, and has been for many years, the broadest right to state anything that shows the operation even of his own mind or any indication—

The Court: That is right. He has the right to show the

operation of his own mind. I have allowed that. He has a right to show, and I think he testified, that at no point did he intend—and he even speaks in his official capacity at the bank—to hold that bank out as a savings bank. He is allowed to say that because that is the operation of his own mind. These other questions which you are trying to develop all of necessity are based upon his reading the minds of other people. I do not think that that is admissible even in a fraud case.

Q. We will adopt the Judge's suggestion. Did anyone ever complain, outside of the Banking Department of the State of New York, that your bank appeared to them to be a savings bank?

Mr. Rollins: That is objected *it*, if the Court pleases, upon the ground it is irrelevant, incompetent and immaterial. That would only be——

The Court: No, I will allow that.

A. No, no one has ever complained of that. The first time I ever heard of it was when the complaint was served upon me and mention was made in the complaint itself.

Q. And was there some prior correspondence which had been introduced in evidence here?

[fol. 561] The Court: With respect to the Banking Department?

Mr. Grimes: Yes.

The Court: They have certainly taken that attitude, so I am not interested in them. You excluded them, so leave them entirely out.

Mr. Grimes: Yes.

The Court: Except Mr. Roth's answer that the first knowledge of the accusation came from the Banking Department. As far as their attitude toward it is concerned, we know that. I do not need to hear any testimony on that.

Q. Did anyone ever say to you that they thought your bank looked like a savings bank prior to the institution of this action?

A. No. Nobody has ever said that.

The Court: Let us take another angle, Mr. Roth. This is in the evidence, but just bearing on that same subject,

was it not your instructions and was it not your objective to construct a banking institution that did not look like a savings bank?

The Witness: That is exactly so. The instructions were that the building was to look more like a department store and less like a bank.

The Court: That rather covers the physical construction. Now we might ask one more question to make sure. Did you at any time, yourself, or did you instruct any of your employees or did you do anything by way of advertising or circulars to convey the impression to the public that you were there conducting a savings bank?

Mr. Rollins: That is objected to, if the Court pleases. That is a question of fact and law that your Honor will have to determine, because there are matters in evidence, admitted advertisements that they had ordered and paid for. Now, the effect of it is a question of fact, and whether he thought that that was a construction on it is not for the witness to decide but for your Honor on the evidence as the trier of the facts.

The Court: I will overrule the objection.

Mr. Rollins: And as the judge.

The Court: I have in mind the exhibits, but my question is intent on the part of the president of the bank by the use of all those exhibits which Mr. Rollins has referred to. That was in my question. Your answer was no?

The Witness: That is my answer, "No."

The Court: No instruction was ever given for that purpose.

Mr. Rollins: May I also urge that whether or not he intended on the general question as to the violation of the statute is immaterial as to his intention. There was an absolute prohibition, so his intent did not measure on that.

The Court: If he had said yes, it would have—

Mr. Rollins: Judge, whether he intended to do so or not is immaterial. The broad question here is whether he [fol. 563] violated the statute. A man is presumed to know the law.

The Court: No, on the language of your complaint.

Mr. Rollins: On one of the elements only.

The Court: That is the one we are treating.

Mr. Grimes: That is the one we are questioning about.

The Court: On the language of your complaint. I must say that the Attorney General indicated earlier in the proceeding that that part of his complaint was not the principal part of his lawsuit.

Mr. Grimes: Yes, I accept that.

Mr. Rollins: As a conclusion because of the facts and following the rationale of the opinion of *People v. Binghamton Trust Company*, your Honor.

The Court: Mr. Grimes' position is that regardless of your own attitude toward the subject, it is in the pleading and he feels he is obligated to meet it and he is trying to do it. Now, have you exhausted that question?

Mr. Rollins: May I at this time, sir, since it is germane, as I believe, point out to the Court in relation to the subject on a matter of pleading that matters of judicial notice need not be pleaded and that a complaint must be read as if the allegations had been included therein, and since the violation of the statute and the circumstances stated in accordance with the opinion of the Court of Appeals in [fol. 564] *People v. Binghamton* concluded that the effect of such violation constituted the fraud, the factual allegations thereof, although I amended the complaint, must be deemed to be incorporated in the complaint even though it had not been mentioned. But to obviate any question as to any difference in point of view of any other court on the subject, if there be a modification or a change, I did not want to take the risk and I thought that prudence dictated I include such allegation in the complaint.

The Court: Not only that, Mr. Rollins, but there is nothing that the Court has said and there is nothing that you have said in this trial which in any way eliminates that allegation from your case, because you may find that to be an element in the prosecution of this case. I made my statement because it was somewhat of a clearing of Mr. Grimes' questions on his attitude toward intent in this matter, as I understand your pleading. Now I do not want to say any more about that. I have spoken rather sketchily because I do not want to minimize the allegation. However, Mr. Grimes, have you completed those denials? You are entitled to those denials in an action of this kind.

Mr. Grimes: No, sir, I have not, because there are several other of these words used which are in the complaint, whether the Attorney General says he did not mean them, or whether—

Mr. Rollins: I did not say I did not mean them.
[fol. 565] The Court: No, he does not say he did not mean them.

Mr. Grimes: They are there, and I have several more which I would like to ask him about.

The Court: Go ahead and develop it, and if you could do it along the lines that I have indicated—do it along your own lines, but if you do it along the lines I have indicated, I think you will move along and I will admit them.

Mr. Grimes: Very well, sir. If you do not feel the form of question that I asked is proper, I wish you would ask it yourself, because what I intend to do is I think very clear.

Mr. Rollins: May I suggest that counsel ask the witness the question and that the case be tried by counsel rather than by the Court. I say that respectfully.

Mr. Grimes: I think you will find it is going to develop that way, Mr. Rollins.

Mr. Rollins: I do not think it is fair to do that in any litigation, particularly where the State is involved and the Judge is an officer of the law.

The Court: But this Court seems unable to keep out of your cases and you are very generous not to become impatient with my substituting of questions for yours from time to time, and I appreciate your attitude. I was worse at one time. I am really doing better now. However, Mr. Grimes, so that we will have a ruling and an understanding on these questions, I will say that you may ask the [fol. 566] witness any question treating with any allegation in the complaint which will elicit from him his own personal intent or the collective intent of the officers of the bank with respect to anything that they have done. But where your question seeks to elicit from this witness what the operation of mind of the public is in response to something that they have done, that I would have to exclude, with the modification that in those instances you develop the facts and then the Court draws the conclusion of what the public mind should have been when it was re-

ceiving those thrusts, whatever they may have been, in the form of advertisements, signs or by word of mouth.

Mr. Grimes: Very well, your Honor. I think I could perhaps shorten this. We have now spent twenty-five minutes on this very simple matter, in view of the objections that have been raised.

Q. Have you observed further, sir, the following charges: that your bank has practiced fraud and deception on the public, has committed a public nuisance, and has usurped the rights and franchises reserved exclusively for savings banks under New York law?

A. Yes, I have.

Q. Did you yourself ever intend to do any of those things?

A. No, I never have.

The Court: You can go further on that question. You can ask him if, aside from the intent with respect to those particular ones, Mr. Grimes, they were ever done.

[fol. 567] Mr. Rollins: That I would object to.

The Court: I will allow it.

Mr. Rollins: Because that is a matter for your Honor to determine after considering the evidence and all of the evidence.

The Court: He has not asked it yet. That is a modification of my previous general ruling and I wanted to state it now.

Q. Did you ever instruct any officer or employee of your bank to do any of those things or take any action which might result in any of those things?

Mr. Rollins: That is calling for a conclusion. All we are interested in is what he actually did authorize.

The Court: I will allow it.

Mr. Rollins: Just as a conclusion, whether it had the effect to do so. Whether he did or not is for your Honor, not for the operation of this witness's mind or for him to draw therefrom as a matter of conclusion.

The Court: I allow it. That is within the scope of the ruling that I made.

A. No.

Q. Were any of those items or things which I have enumerated ever done, as far as you know?

Mr. Rollins: That is objected to.

The Court: I will allow that.

A. No.

[fol. 568] Mr. Rollins: I want to mention that that is a matter for your Honor to decide and that is the issue before the Court today.

Mr. Grimes: I concede that this case is a matter for his Honor to decide. Perhaps that concession will clarify things. The Judge is to decide this case.

Mr. Rollins: Based upon the evidence.

Mr. Grimes: Based upon the evidence and the lack of evidence.

The Court: Go ahead. I have said that in a fraud case the witness may make these denials.

Q. Did anyone ever complain to you that any of those things were done?

Mr. Rollins: That is objected to as being incompetent, irrelevant and immaterial.

The Court: I will allow that.

A. No.

Q. Do you know of any complaint to any officer or agent or employee of the bank, the defendant bank, that is, that any of those things were ever done?

Mr. Rollins: That is objected to, if the Court pleases, being incompetent, irrelevant and immaterial.

The Court: I will allow it.

A. No.

Q. Now would you state how what has been testified to here as the family lobby or building No. 2 came into [fol. 569] being? Start at the beginning, sir, with your arrival in Franklin Square and the development of the business and the development of that concept.

A. Well, that goes back quite a ways, so I would rather start with the reason for our requiring additional banking space; which was that we had increased our business to the extent where we required this additional space. Of

course, it was during the war period and we could not build at that time, and so we started to plan for the type of building that we wanted to erect at the time the government would permit construction to start, and that was actually some three or four years before it really commenced. I mean, the planning started some three or four years before we actually started construction. It has always been our thinking at Franklin Square—

Mr. Rollins: If the Court pleases, I am not interested in and I do not think the Court should entertain any such evidence of what they were thinking of the construction. It is what they actually did that is the concern of the Court.

The Court: If you object to that, I think the objection is well taken.

Mr. Grimes: If your Honor please, may I say that, before you make a ruling, he may state—

The Court: I am just ruling on the last. He said, we were thinking about something, and, of course, he cannot—

Mr. Grimes: I think they may state their purpose, their [fol. 570] thinking, in view of the broad scope of these charges. I respectfully submit they may in so far as their thinking came into being in some way which is related to the issues here. Now the building begins with thought, then goes into plans, and then goes into construction. I think all phases, in view of the charge here, may be testified to by this witness.

The Court: No, I must sustain the Attorney General's objection that the witness cannot state any thinking processes that he had. His testimony started off by telling what was done.

Mr. Grimes: Very well.

Q. Did you have a purpose in mind in connection with the construction of this building, starting right from the beginning? Avoid the use of the words "our thinking," please.

Mr. Rollins: May I call to the Court's attention that this is a corporation and that corporate action is by board of directors, not by one individual, and what this man thinks and what he intends to do and what he actually did, unless

it is authorized by the corporate defendant, does not reflect the action of the defendant corporation as a corporate entity.

The Court: As I understand it, he is testifying as president of the bank.

Mr. Rollins: He is not telling about the corporate action, the directors' resolutions.

The Court: He has not gotten to that point yet. He is [fol. 571] speaking now as president of the bank in his executive capacity, and the bank is the defendant here, so I think he should be allowed to state what was done, not necessarily resolutions or what was done or any proposals that were not adopted, but those things that were done. Now, go ahead.

Q. You were at the point where you were discussing the origins of the family lobby during the war.

The Court: So you will not be misled by my statements, Mr. Roth, included in what was done are any references that you made with respect to a decision to the board of directors, and you can include in your statement, as you go along, that the board of directors also did something by way of resolution. Go right along on that.

Q. I think you may also state—I think your Honor will bear with me—what you did and what anybody instructed you to do, whether or not the board of directors was concerned in the matter.

The Court: That is right, in your capacity, as president of the bank.

A. As president of the bank.

The Court: Now go right ahead.

A. In recent years an important phase has come into commercial banking and that has had to do with the little [fol. 572] fellow, who has become one of the largest sources of income for commercial banks.

Mr. Rollins: May I ask that that statement be stricken out as not being responsive?

The Court: Motion granted.

Q. Would you state, please, Mr. Roth, the purpose for which the family lobby was designed?

A. It was designed in order to conduct business with the little fellow and, as we term it, retail banking as contrasted with wholesale banking, wholesale banking being in connection with the business account, the commercial account.

Q. Would you state how that concept was carried out in actual fact in the design and construction of the family lobby.

A. By designing it to look like a department store, with counters and display cases similar to department stores, displaying in those cases articles which we would finance if they were purchased on time, items that they should try to save in our savings accounts in order to purchase.

Q. Did the role that women play in connection with bank deposits and doing business with the bank have anything to do with the design of the family lobby?

A. Yes, because approximately 80 percent of family banking is done by women. We wanted the appearance of our family lobby to be such that women would feel at home there, rather than the cold or austere atmosphere that you usually find in commercial banks and other types of banks.

Q. Did you instruct your architects to carry your ideas, [fol. 573] the ideas which you have just expressed, into being in connection with the design and construction of the family lobby?

A. Yes, we instructed our architects to make it look like a department store.

Q. At the time or prior to the time the family lobby was built, did you decide upon and make plans for a division of your bank business?

A. Yes, a division whereby one lobby would serve the commercial accounts and the other lobby would serve the family accounts.

Q. Was that a customary division in the banking business?

A. No, I do not know of any other such division in any bank in the United States.

Q. Where did you decide to put or leave the commercial

part of the business at the time of the construction of the family lobby?

Mr. Rollins: If your Honor pleases, that is objected to as an operation of this witness's mind. It is not what he planned, it is what he did that we are concerned with.

Mr. Grimes: All right, we will accept the very helpful suggestion of the Attorney General.

Q. What did you do, if anything, about the commercial aspects of your banking business?

A. We let it remain in the lobby that formerly served all types of business, and we restricted that lobby to our commercial business and transferred to the new lobby the family banking.

Q. Did you instruct your architects to make the family lobby look like a savings bank?

A. No.

[fol. 574] Q. What were your instructions in that respect?

A. That the family lobby look like a department store.

Q. Can you express an opinion as to whether they carried your instructions out?

A. Yes. I feel that they did carry our instructions out.

Q. Now I show you one document and ask you what that document is.

A. This is an annual report of the Franklin Square National Bank.

Q. For what year?

A. For the year ending December 31, 1948.

Q. I show you another document and ask you what that is.

A. This is an annual report of the Franklin Square National Bank, for the year ending December 31, 1946.

Mr. Grimes: I offer the 1946 report in evidence.

Mr. Rollins: It is objected to. First, it is not within the issues. Our complaint is for the year 1947.

Mr. Grimes: It is offered for the purpose of showing the statements made at the time about the building and the purposes of construction.

Mr. Rollins: A self-serving declaration.

The Court: To that offer, Mr. Grimes, I must sustain the objection.

Mr. Grimes: I respectfully except.

Mr. Rollins: The 1948 report is Plaintiff's Exhibit 11; it has been offered by the plaintiff and received in evidence.

Mr. Grimes: That is in evidence?

Mr. Rollins: Plaintiff's Exhibit 11.

The Court: The 1948 report is in evidence.

[fol. 575] Mr. Grimes: I then offer so much of the report as appears on page 4 and is pencil-marked.

Mr. Rollins: It is all in evidence, sir.

The Court: This is the 1946 report, is it not?

Mr. Grimes: 1946.

The Court: Show it to Mr. Rollins.

Mr. Rollins: I made the objection to the entire thing, and that is a part of it.

The Court: Just see what that is and we will see. I will rule on the offer.

Mr. Rollins: If your Honor will look at *at* it, I object to it not only upon the ground that it is a self-serving declaration, but also on the ground——

The Court: Just object.

Mr. Rollins: Yes, sir, I object to it on the grounds it is incompetent, irrelevant and immaterial.

The Court: You do not have to give the reasons unless I ask. I must sustain the objection.

Mr. Grimes: May I have that marked for identification, please. I except.

(Marked Defendant's Exhibit FF for identification.)

Mr. Grimes: Just the page, I guess. I also ask that these be marked for identification.

(Marked Defendant's Exhibits GG, HH, and II for identification.)

[fol. 576] Q. Mr. Roth, I show you Defendant's Exhibit GG for identification and direct your attention to page 46 of that exhibit, GG being a copy of the magazine *Banking* for the year 1947, July, and ask you whether the article appearing therein was gone over and approved by the defendant bank prior to its publication?

A. Yes, it was.

Q. Is that article characteristic of publicity issued by

the bank at the approximate time of the publication of the article?

A. Yes, it is.

Mr. Grimes: I offer that in evidence.

Mr. Rollins: Objected to upon the grounds it is incompetent, irrelevant and immaterial and self-serving.

Mr. Grimes: It is offered, sir, upon the ground of a contemporaneous document bearing upon the intent ante litam motem and explaining what the purpose of the bank was at that time. I have other articles of like import which I also intend to offer, bearing upon the charges of deliberate deception, deliberate fraud in the appearance of the bank and the banking practices.

The Court: I will have to sustain the objection to the admission of this article.

Q. Mr. Roth, I ask you the same questions with reference to Defendant's Exhibits III and II for identification and ask you whether your answers would be the same.

A. Yes, they would.

Mr. Grimes: I respectfully except, your Honor, to your ruling.

[fol. 577] A. Yes, my answers would be the same.

Mr. Grimes: I offer both documents in evidence.

Mr. Rollins: Same objection.

The Court: The objection is sustained.

Mr. Grimes: I respectfully except.

Q. Mr. Roth, it has been shown here that the defendant bank was incorporated as a national bank in the year 1926; is that correct?

A. That is correct.

Q. Does the defendant bank have a branch?

A. Yes, we have three branches: at Elmont, Levittown, and Rockville Centre.

Q. Which was the first one established?

A. Elmont.

Q. What year?

A. The early part of 1950.

Q. I show you a picture and ask you whether this is a true representation of the exterior of the branch at Elmont?

A. Yes, it is.

Mr. Grimes: I offer it in evidence.

Mr. Rollins: No objection.

(Received in evidence and marked Defendant's Exhibit JJ.)

Q. What was the second bank branch that your bank established?

A. Levittown.

Q. When was that established?

A. June 1950.

Q. I show you a picture and ask you whether this is a true representation of a branch of your bank at Levittown?

A. Yes, it is.

Mr. Grimes: I offer it in evidence.

Mr. Rollins: No objection.

(Received in evidence and marked Defendant's Exhibit KK.)

[fol. 578] Q. When was the third branch established?

A. December 1950.

Q. I show you a picture and ask you whether it is a true representation of the branch. Where is that branch?

A. At Rockville Centre. Yes, it is.

Mr. Grimes: I offer that picture in evidence.

Mr. Rollins: No objection.

(Received in evidence and marked Defendant's Exhibit LL.)

Q. Now with reference to Defendant's Exhibit LL, are both portions of the two buildings there being used for banking purposes or a branch?

A. No, only the one portion which has the sign on it, "Franklin National Bank."

Q. Have any complaints ever been made to you that any of those branches look like savings banks?

A. No.

Q. As a matter of fact, referring to Defendant's Exhibit LL, was there some sort of bank there prior to its becoming a branch of your bank?

A. Yes, that was the South Shore Trust Company of Rockville Centre.

Q. That was a State bank, was it not?

A. That is correct.

Q. And about the other two branches, were there any predecessor banks there?

A. No.

Q. Mr. Roth, I show you a document and ask you to state whether the figures contained on this document are correct figures showing what they purport to show by the description thereon.

A. These are correct figures taken from the books of the Franklin National Bank showing the growth of deposits [fol. 579] and savings deposits year by year over the period from 1941 through 1951.

Mr. Rollins: Is this the same thing? This is in evidence (handing to Mr. Grimes).

Mr. Grimes: No, I don't think so.

The Court: Ask Mr. Roth that. He could answer that in a second.

Q. These figures I have just shown you are not the same as on your 1950 annual report, are they?

A. No; although our 1950 annual report shows total deposits at the end of a number of years, going back to 1934, it differs from the sheet you just showed me because that sheet is a breakdown of deposits by checking accounts and savings accounts as of the end of each year (referring to Plaintiff's Exhibit 36).

The Court: So it is different.

The Witness: It is different.

The Court: When the witness referred to "our report of"—what did you say that was?

The Witness: December 31, 1950.

The Court: —he meant Plaintiff's Exhibit 36 in evidence. All right. That is offered in evidence. The witness says it is different.

Mr. Rollins: No objection.

(Received in evidence and marked Defendant's Exhibit MM.)

The Court: Go ahead, Mr. Grimes. I will just glance at this.

[fol. 580] Q. Mr. Roth, it is a fact, is it not, that in the case of your bank, starting with 1941 and going through 1948, in each of those years your total savings deposits exceeded the total demand deposits of your bank? Is that not correct?

The Court: I wonder, Mr. Grimes, if you are not falling into an error that you sought to correct earlier in the trial? You have never identified these accounts as savings accounts. You did call them interest-bearing accounts. It does not make any difference to the Court, but I was just reminding you.

Mr. Grimes: We usually refer to them as savings accounts.

The Court: All right. Go ahead, then.

Mr. Grimes: They are also listed on that sheet as pass-book accounts and interest-bearing accounts.

The Court: I did not know whether it was just an oversight.

A. My answer is that savings deposits did exceed checking account deposits for the period mentioned, from 1941 through the year 1948.

Q. And it has only been in the last two years that the situation has reversed itself, is that correct?

A. That is correct.

Q. In other words, demand deposits have exceeded savings deposits?

A. That is correct.

Q. Now would you explain to the Court, please, based upon your experience and your knowledge as a banker, the importance of savings deposits to your bank.

A. Well, savings deposits are extremely important to [fol. 581] our bank. It is indicated by Defendant's Exhibit MM, where they constitute half of the total deposits of the bank.

Q. Now will you explain the importance in connection with the total resources of the bank and how it affects your profits and affects the community and affects industry. Will you explain those facts to the Court, please.

Mr. Rollins: May I call to the Court's attention that the statute upon which we base this action, Section 258, subdivision 1, does not prohibit any commercial bank, including a national bank, from accepting time deposits. The complaint in this action and the basis of this action is to prevent them from using the methods that they do in getting those time deposits, and therefore the question is incompetent, irrelevant and immaterial.

The Court: This is a preliminary question, evidently, and counsel has to begin somewhere. He is only beginning to develop his point in this way.

Mr. Rollins: It is axiomatic that the life blood of all banking business is funds and deposits. They cannot do business without money.

The Court: You had better let this witness give his own views with respect to these interest-bearing accounts. That is what the question was. Do you know the question, Mr. Roth?

(Last question read by reporter.)

Mr. Rollins: Objected to as it affects industry and as it [fol. 582] affects the public. He is not qualified.

The Court: Yes, as long as there is an objection there.

Mr. Grimes: Very well, I will withdraw the question and rephrase it.

The Court: Divide it.

Q. Will you please explain to the Court the importance or lack of importance of savings deposits to your bank.

A. Without time deposits and savings deposits, which constitute the bulk of time deposits, we would not be able to make mortgage loans in a national bank except to the extent of 100 per cent of the capital stock of the institution, which is small when compared to the deposits of the bank. Therefore, we would be restricted greatly in our mortgage lending, and in Nassau County the building industry has been the largest employer in the county, so that it would hamper the growth of our community—

Mr. Rollins: I move that be stricken out, " * * * it would hamper the growth of the community and the building progress in this community"—

Mr. Grimes: I consent that be stricken out.

Mr. Rollins: —“is the biggest customer.”

The Court: All right. Consented.

Q. I am going to ask you to confine your answer—perhaps I misled you a bit—to the direct effects on the bank, the extent of the business, profits, interest rates you are [fol. 583] able to pay, and in any other way.

A. Without savings deposits we could not make mortgage loans except to the extent of 100 per cent of the bank's capital. Mortgage loans are a very profitable source of income for our bank, and if we were not able to make these mortgage loans because of the lack of savings deposits, the profits of the bank would suffer.

Q. And you make loans to the building industry?

A. Yes, we do.

Q. And loans to virtually every type of industry in the community?

A. That is correct.

Q. These loans are made, in part at least, from the capital or funds, total resources, of which savings deposits are the portion indicated in that exhibit, is that correct?

A. That is correct.

The Court: Mr. Grimes, I think I excluded part of Mr. Roth's testimony before by my ruling, which was a sort of over-all ruling, but I think that I should allow Mr. Roth to testify to the effect on the community by any restriction that might be placed upon their receiving these interest-bearing accounts.

Mr. Rollins: If your Honor pleases, I think we have missed the issue here. The statute involved does not prohibit this bank, national bank, or any commercial bank from receiving time deposits.

The Court: That is right.

Mr. Rollins: It only restricts them in advertising and solicitation, so that question is incompetent, irrelevant and immaterial. There is no injunction upon any bank from receiving time deposits.

[fol. 584] The Court: That is not the angle from which I am approaching it, and I feel I ought to explain my thought because you may or may not want to pursue that question; use your own judgment. My point is this: that the Federal

Government, having authorized this bank to accept interest-bearing accounts, I must consider that the Federal Government was doing that not necessarily for the exclusive benefit of the stockholders of the community but because the Federal Government conceived the idea that this was a necessary activity that each community wherein they establish a bank needs. Therefore, I will allow the witness to testify to the effect upon the community of restricting that business which the Federal Government authorizes. As I say, you may now pursue the point or not, as you wish.

Q. Yes, I wish you would on that understanding.

Mr. Rollins: May I respectfully except to your Honor's ruling and observation of the law, because that is not a function of a national bank at all. As counsel himself pointed out, the function of a national bank is to stabilize the currency and also to act as a commercial bank. It is in the same category as all commercial banks, whether under State or Federal charter. The sole question here is whether or not the statute as a matter of law is unconstitutional, whether there is a superseding statute which [fol. 585] supersedes the State law. Now, all that is irrelevant, I respectfully submit, what effect it may have on the community. All regulation by government tends to stop certain conduct upon somebody and somebody's feet are stepped on.

The Court: I am keeping in mind, Mr. Rollins—and you do not seem to share that view——

Mr. Rollins: There are forty-six banks, Judge.

The Court: Yes. You do not seem to share that view, consequently you will not be able to follow my line of thought.

Mr. Rollins: Is it because your Honor may not give an injunction because you are afraid of the effect it may have on the community?

The Court: Oh, no. The idea is—I will explain it—that in my judgment any action by a State that interferes with the Federal Government in the exercise of one of its concurrent powers, which action interferes with the objective of the Federal Government——

Mr. Rollins: Judge, we have wasted nine days, if your Honor rules that that statute——

The Court: That affects this statute, Section 258.

Mr. Rollins: That cannot be determined by the facts in the case.

The Court: Just a moment. Section 258, as I understand the defendant's defense, is that that affects and [fol. 586] restricts this activity which the Federal Government authorizes. That is what their point is, so I will receive evidence to establish that.

Mr. Rollins: Judge, will you permit me to point out one thing. What the State statute specifies in the circumstances of this case, if there is a superseding statute, as in the First National Bank of St. Louis v. Missouri, which I say is controlling in this case, has no effect upon the decision and should have no effect on the decision. If that Federal statute says expressly or by implication, as my adversary contends, that he has the right to advertise by using the prohibitive term "saving" or "savings", then they have that right and I say Section 258 is not controlling, it has been superseded. Now, if you come to that conclusion and you say as a matter of law that is so, then we have wasted nine days in this court and that is the controlling question. That is not so, though. If your Honor rules to that effect, that throws the whole case out.

The Court: There is nothing in the Federal statute that authorizes the use of these contested words. The use of those contested words would be by implication only.

Mr. Rollins: Only in the statute. As the Court gave the definition, they said that those powers not specifically granted are deemed to be withheld, unless the attainment of the object—and I will cite the exact words—

[fol. 587] The Court: You do not have to go into this so broadly as that. I only want to say that I made a ruling and I must not mislead counsel by a ruling. I have said to counsel that I did not intend to exclude that kind of testimony which I referred to in my last statement. Now that is all that is before me and I do not wish to go into it any more broadly than that. As I say, Mr. Grimes, I thought it was due you that I explain the ruling. You may develop the point or not. There is no question before the witness now.

Mr. Grimes: I appreciate it very much, your Honor. I

would like to correct one misapprehension that the Attorney General seems to be under about what I have said. I have said that being a fiscal agent of the Government is one and only one of the purposes of a national bank. They have had many: to provide a national currency, a function they no longer provide, but one of the main and leading purposes was to provide funds from which the Government could borrow, whether by means of savings accounts or otherwise; also, to provide funds for industry, when they allowed them to become commercial banks and, in fact, set them up as commercial banks. Of course, upon that theory I think the question is proper in so far as it relates directly to the bank itself and also to the community, because one of the purposes of a national bank was to serve the community as well as the Government.

The Court: That is my view, the latter.

[fol. 588] Q. I will ask the witness to confine his answers very briefly to the point of industry and continue answering the question about the importance of savings deposits—and I am using the words of the Federal statute when I say “savings deposits”, as the bank does.

The Court: That is right.

Q. So far as these savings deposits are concerned, could you continue with your answer as to the importance as you see it.

Mr. Rollins: There is no question there.

The Court: The question is, Mr. Roth—it is just put in with the other one—with respect to savings deposits, what is the effect upon the community of the amounts you receive or a lesser amount that you would receive?

Mr. Rollins: Object to the question upon the ground that this man is not a qualified economist and that statement would be mere speculation.

Q. You will confine it, of course, to banking, that phase of economics relating to banking, will you please.

The Court: Yes, just the point of view of banking. You began to tell us about the making of loans for mortgages, and so forth. That has an effect upon the community, does it not?

The Witness: And we have a very large demand for mortgage loans, for loans to businesses, for loans to individuals, and without a sufficient volume of savings deposits together with other deposits, we would not be able to serve the demand for such loans properly.

The Court: In your community.

The Witness: In our community.

The Court: That you serve. All right.

Q. Do you use some of those funds for the purchase of Government bonds?

A. Yes, we do.

Q. In substantial quantities?

A. In substantial quantities.

Q. Can you state the approximate quantity of United States Government bonds which your bank has in its portfolio now.

A. Twenty-seven million dollars.

Q. Approximately how much of those come from savings accounts?

A. In a commercial bank in New York State we do not segregate the investment of our demand deposits and savings deposits. We invest both combined.

Q. I understand, but then would you state what the ratio is between your savings and your demand deposits now.

A. Approximately 60 per cent demand deposits and 40 per cent time deposits.

The Court: I will recess before you go into another subject, Mr. Grimes, until two o'clock.

(Recess.)

[fol. 590]

AFTERNOON SESSION

Mr. Grimes: Judge, I am just going to make one more offer. These are what the charts look like. They are readable and very clear. We prepared them, as I say, merely for the clarification of the Court, and my understanding of the rule is that documents of this sort are admissible not as proving anything in and of themselves but as representing in graphic form what has been testified to. If your Honor does not think they are helpful and does not wish to exercise his discretion, that is the end of the matter, of

course. I have a witness here who is prepared to authenticate them.

The Court: I am only guided by the Attorney General's attitude. If he objects, I must sustain the objection. If he does not, I will take them.

Mr. Rollins: Except that it clutters up the record, Judge. The record as it is is quite voluminous.

Mr. Grimes: It is already in the record, no doubt about it. I am offering them for the convenience of the Court.

The Court: But they do not need to be put in evidence to use them, you know. They are good argument. I should think you could carry them to the Court of Appeals and present them in the Court of Appeals on your argument without their being in evidence.

Mr. Grimes: Yes, I think that is quite so.
[fol. 591] The Court: I think if there is objection to their going into evidence, I will have to sustain it.

Mr. Grimes: Very well, sir.

The Court: But, as I say, I am not excluding them from—

Mr. Rollins: If there was a jury here, Judge, I would have no objection at all, because it would be very helpful for a jury to set them up here, but I do not think your Honor will need them.

Mr. Grimes: For your convenience and clarification, that is all.

Mr. Rollins: We all know that the question is not so much percentages. We know what their purpose was to serve with this poll: to show that the majority of people in the county do not have an understanding of the three terms used by commercial banks. That is the basic question, if it has any value at all. What the percentages are, to my way of thinking, as applied to the basic law is immaterial.

Mr. Grimes: Of course, we think otherwise.

Mr. Rollins: What difference does it make about the percentages, whether it is 90 per cent or 80 per cent or 30 per cent?

The Court: We have to have them have their own ideas. The only observation I could make, Mr. Grimes, is that this is not the season to have so much red in anything.

Mr. Grimes: Of course, the red here is of a very innocuous type.

The Court: By the time you get to the Court [fol. 592] of Appeals the red situation may be paled by then. I hope so.

Mr. Grimes: I fervently hope so, sir.

The Court: Let us proceed.

Mr. Rollins: I would like your Honor to read Section 10. I meant to call to your Honor's attention the Banking Law, which expresses the policy of the State of New York with reference to preventing any unlawful competition or strong competition among all banks.

The Court: I will be glad to read it, Mr. Rollins.

By Mr. Grimes:

Q. Mr. Roth, I believe we have covered the subject of the importance of savings deposits to your bank. Now would you state to the Court, please, your opinion based upon your experience as to the importance of savings deposits to other national banks, first excluding those of New York City itself?

Mr. Rollins: That is objected to, if the Court pleases, being incompetent, irrelevant and immaterial.

The Court: I think I will sustain the objection to Mr. Roth's giving an opinion about the effect on other national banks.

Mr. Grimes: Very well, sir.

Q. Then, I ask you this question: Do you know, from your experience and from your reading and from your business, [fol. 593] the ratio of savings accounts to demand accounts in other national banks in the State of New York?

A. Yes, I do.

Mr. Grimes: Now I am going to offer at this point, if your Honor please, a stipulation which contains data to which we have agreed as to the accuracy thereof.

Mr. Rollins: Took it from statistical sources, and we stipulated that those are the facts, subject to our objection to be made upon the trial that they are incompetent, irrelevant and immaterial.

The Court: Let us do it in an orderly way. Offer it in evidence.

Mr. Grimes: Yes, I offer that in evidence. It is a stipulation signed by the Attorney General.

The Court: Any objection to that going in evidence?

Mr. Rollins: I object to the facts therein stated.

The Court: But you do not object to the paper going in evidence.

Mr. Rollins: No.

The Court: But you do object to the contents.

Mr. Rollins: That is right, as being incompetent, irrelevant and immaterial.

The Court: The facts are stipulated to be facts.

Mr. Grimes: Excuse me, I think we have that "incompetent" so much. The competency is conceded. He has reserved right—

Mr. Rollins: Relevancy.

Mr. Grimes: —as to relevancy and materiality [fol. 594] to object on those grounds, and if your Honor wishes, we are both prepared to be heard on this subject. I will be very glad to state the reason why we are offering that. It is offered on the question of competition.

The Court: Just let me read your stipulation. That may tell the whole story. You have agreed upon it.

I am going to receive this in evidence. Of course, the stipulation covers the objection.

Mr. Rollins: Yes, sir.

(Received in evidence and marked Defendant's Exhibit NN.)

Q. Mr. Roth, I hand you Defendant's Exhibit NN and ask you to comment on that to the Court on the subject of competition.

The Court: What those figures mean.

A. Exhibit A in the Court's Exhibit is the tabulation of the deposits of the banks of Nassau County for the past five years.

Mr. Rollins: May the record show Exhibit A is a part of another exhibit.

Mr. Grimes: Yes. He said Exhibit A to the Court's Exhibit. The Court's Exhibit has the number designation up on top.

The Witness: NN.

Mr. Grimes: So that is Exhibit A to Defendant's Exhibit NN.

The Court: All right. Go ahead, Mr. Roth.

[fol. 595] A. (Cont'd) It shows that during the period from 1945 through 1949 the deposits in national banks, consisting of both time and demand deposits, grew from 215 million to 277 million, and the deposits of the State banks during the same period from 162 million to 182 million, and for the two combined a total of 377 million to 460 million during that period. Then the one savings bank in Nassau County had deposits of 17 million in 1945 and they were 23 million at the end of 1949. Then this exhibit is broken down to show the time deposits in the various banks and the demand deposits.

Q. Mr. Roth, since that used the phrase "time deposits," will you explain to the Court, please, the ratio between time and savings deposits and whether savings deposits form a part of time deposits in banking terminology?

A. Savings deposits are a part of time deposits. There are other types of time deposits besides savings, such as time certificates of deposits, corporations and individuals, time deposits open account, Christmas Club deposits, and escrow accounts on a time basis, and some others.

Q. What ratio do savings deposits ordinarily bear to time deposits?

A. In our bank the ratio of savings deposits to time deposits is approximately 80 per cent. It's a little higher, I believe, in our case—I know it to be so—than in the case of other commercial banks outside of the City of New York, where, generally speaking, they are about 90 per cent of time deposits. However, within the City of New York the ratio of savings deposits to time deposits is less than 50 per cent.

Q. Why is that?

A. Because within the City of New York you have a great [fol. 596] many corporation deposits that are placed on a time basis.

Q. Could those be surplus corporate funds?

A. Surplus corporate funds.

Q. When you say a time basis, could you give the Court a typical illustration of a corporate time deposit?

A. Yes. For instance, the County of Nassau has money on deposit with various banks on a time basis payable on thirty days' notice of withdrawal, upon which they receive interest.

Q. Is interest usually small for such a deposit?

A. Yes, it is.

Q. What per cent would be paid at the present time, say?

A. Approximately a half of one per cent on such deposits.

Q. Now will you go ahead, please, following that explanation.

A. This Exhibit A shows the growth of time deposits, as I mentioned, for these various types of banks for the same period from 1945 through 1949, and in national banks they increased from 98 million to 124 million, and in State commercial banks from 69 million to 76 million, and the total of both national and state banks, 167 million to 200 million. Then, in addition to that, this schedule shows the growth of demand deposits for the same period for the same types of banks, in 1945 national banks having had demand deposits of 116 million and in 1949 152 million; and in state commercial banks, from 92 million to 106 million; for the two types of commercial banks combined, from 209 million to 259 million—all of which seems to indicate that the banks in Nassau County have increased their deposits of both time and demand, as have other banks throughout the country, and that is indicative of the increase in the over-all money [fol. 597] supply in the country due primarily to the inflationary period that we passed through during that time.

Mr. Rollins: I move that be stricken out, "based primarily upon the inflationary period of that time."

The Court: All right. Leave that out.

Mr. Rollins: Because this gentleman is not an economist.

The Court: You do not need that. Strike out "based upon——"

Q. Now will you please explain to the Court your opinion based upon those figures as to the extent of competition for

time deposits between various types of banking institutions.

A. Competition for time deposits by the various types of institutions and also the individual institutions—

Q. And name the types, please, as you testify.

A. —within the types has always been very keen and very aggressive.

Q. Between what types of institutions, starting with your bank and other national banks?

A. Between national banks, between state commercial banks, between savings banks, and between savings and loan institutions.

Q. By that do you mean each type of institution with the other?

The Court: Is a national bank in competition with a savings bank?

The Witness: Yes, the national banks are in competition with the savings banks.

Mr. Rollins: May I call your attention to the Mercantile Bank of the United States Supreme Court and what they [fol. 598] there said? A national bank is not in competition with any other bank as a matter of law, as I cited in my brief. Shall I give you the citation, sir?

The Court: No. This witness would be allowed to answer this question anyway, because this refers to the accumulation of these particular deposits, not as an over-all proposition. The question was restricted to time deposits.

Mr. Rollins: I don't know how he can state that, sir, in figures, and I say he is not qualified. I move that his answer be stricken out.

The Court: No. I think I will let the witness answer. Let the answer stand that there is, he has said, competition. (To Witness:) Could you describe or characterize it by an adjective? Is it keen, intense, or mild?

The Witness: I said it was keen and aggressive.

The Court: That is right, you did. You said it always was.

Q. For the record, I wish you would state, competition between whom?

A. Between all types of banks and all individual banks in the categories that I mentioned: national banks, state

commercial banks, savings banks, and savings and loan associations.

Q. National banks with each other?

A. Yes, national banks with each other.

Q. National banks with state banks?

A. Yes, that is correct.

[fol. 599] Q. Including state savings banks?

A. That is correct.

Q. For time deposits?

A. That is correct.

Q. I don't believe you finished analyzing that Exhibit XX, have you?

The Court: He did. He got to the last column, unless he has something generally to say.

A. One portion of it is marked Exhibit A, and then we have a continuation of Exhibit A on the following page which is a summary of the assets and deposits of state institutions as of the report date nearest to January 1st of each year shown.

Mr. Rollins: May I point out to your Honor that they have meticulously omitted mention as to the time deposits outside of Nassau County, for some reason or other. They only have limited themselves to Nassau County.

The Witness: It shows the assets and deposits of savings banks for the years 1946 through 1950 and it indicates that the deposits of savings banks increased from 8 billion 200 million to 11 billion 100 million during that period, and that in the case of state commercial banks exclusive of trust companies, the deposits decreased from 457 million to 387 million, and in this case there is a decrease for the same period, and in the case of state trust companies, the deposits increased from 21 billion 700 million—and in this case there is a decrease again—to 17 billion 800 million for [fol. 600] the period mentioned. In the case of savings and loan associations the amount due to shareholders for the same period increased from 334 million to 514 million.

Mr. Rollins: Did your Honor take note of that decrease about the savings banks?

The Court: Yes.

Mr. Rollins: As the increase of the national banks, the time deposits.

The Witness: I am sorry, I did not read any decrease in the case of savings banks. There was a substantial increase.

Mr. Rollins: May I call your Honor's attention to page 2 of Exhibit A.

The Court: That decrease is under banks. Savings banks are on the left side and there is an increase. Those are "Banks" as distinguished from "Savings Banks," as I read it. Let us have the witness answer. Mr. Roth, the Attorney General drew the Court's attention to this decline in deposits in the fifth column. Can you explain that? He understood that to be savings bank deposits.

The Witness: Yes, I can explain that. That does not have reference to savings bank deposits; it has reference to deposits of state commercial banks which do not have trust powers. When they receive trust powers, then the state, in making up these statistics, includes the deposits of the state commercial banks with trust powers under "Trust Companies."

Q. So that there actually was not a decrease of savings [fol. 601] bank deposits during that period; there was an increase?

The Court: He read that, from 8 to 11.

A. There was a substantial increase from 8 billion to 11 billion dollars in that period mentioned, that's right.

Q. Have you completed the second page, that is, Exhibit A?

A. I have completed the second page, and on the third page of this exhibit there is a tabulation of the total assets of all Federal savings and loan associations in the State of New York for the years 1944 through 1949, as of December 31st, which shows an increase from 275 million to 691 million for the period stated, and also a tabulation of deposits of all national banks in the State of New York for the years 1945 through 1949, as of December 31st, which shows in the case of demand deposits a decrease from 13 million to 10 million, and in the case of—

Q. That is billion, is it not?

A. Yes, I am sorry, that is billion, correct. That is 13 billion dollars decrease to 10 billion dollars, and in the case of time deposits an increase from 1 billion 400 million to 1 billion 800 million.

Mr. Rollins: Will your Honor take judicial notice that Federal savings and loan associations are subject to Federal—to the Commissioner of Currency of the United States, and that the State has no jurisdiction or supervision thereof?

The Court: Yes, we will take judicial notice of that.

Mr. Grimes: Of course, a purported application of Sec- [fol. 602] tion 258 allows them to use the word "savings" as well as "savings banks."

Mr. Rollins: And I submit that even if it did not affect them, it still would because that would be a superseding statute.

The Court: All right.

Mr. Grimes: I think we are agreed thoroughly on that point. The Federal statute supersedes the State.

Mr. Rollins: We have no control of United States Federal Savings and loan associations.

The Court: Let us not broaden the discussion at this time. We are just having Mr. Roth interpret these columns of figures.

Q. Having pointed out the various increases and decreases, would you again explain to the Court, please, based upon the entire Defendant's Exhibit NN and all the figures contained therein, what that shows as to competition between the various banks and financial institutions in the State of New York.

Mr. Rollins: That is objected *it*, if the Court pleases, because it is not a proper basis upon which to determine the extent or method of competition, it cannot be reflected upon mere figures, and that is a subject of the opinion of a trained economist and an experienced one.

Q. I will amend that to include, please, Mr. Roth, in the question matters included in the stipulation and out- [fol. 603] side of the stipulation, based upon your ex-

perience as an economist of that branch known as banking and your general knowledge of economics.

Mr. Rollins: If your Honor pleases, the answer sought to be given would be incompetent because the opinion of this witness is sought not only upon matters in evidence but also upon matters dehors thereof, which would be hearsay in any event, and I submit again that the theory or principle of law enunciated in *People v. Keogh*, 276 N. Y., covers this situation.

The Court: Mr. Grimes, I want to get the purport of this question. First, are you asking for opinion evidence?

Mr. Grimes: Yes, sir.

The Court: And then you are asking Mr. Roth to state in his opinion, using Defendant's Exhibit NN as a basis, what is the nature of the competition? Is that it?

Mr. Grimes: I am asking it, sir, in this form: I am asking him his opinion as an expert, based upon his knowledge and upon his own experience and the facts within his own knowledge as to the extent of competition between the various banks and financial institutions in the State of New York. He has given that based upon Exhibit A of Defendant's Exhibit NN, that is, the first page. I am now asking him the same question with respect to the entire exhibit. I should have postponed my question until [fol. 604] he was through with the exhibit, as I thought he was before.

The Court: What I have in mind is that Mr. Roth has already answered that there is an aggressive competition between and among all banks, even banks of the same type. Now you are asking, are you not, the same question again?

Mr. Grimes: Yes, to include the entire exhibit, but I will withdraw the question.

The Court: All right.

Q. Mr. Roth, will you state, based upon your experience, sir, and the facts within your own knowledge, the extent of competition between the defendant bank and savings and loan associations?

Mr. Rollins: That is objected to, if the Court pleases, being incompetent, irrelevant and immaterial.

The Court: I have to sustain the objection. That is a pure conclusion of the witness.

Q. Will you state whether your bank is in competition with—

The Court: Mr. Grimes, I wonder if this—

Mr. Grimes: I am not sure I understand the basis of your ruling, sir. Perhaps you could enlighten me.

The Court: That last question is just drawing a conclusion from Mr. Roth, what he thinks the competition between his bank and savings banks is. That is just his conclusion and, of course, I would think that is excluded. Now, could I just venture this thought on the whole subject: I consider it within the rules of evidence to ask Mr. Roth if the figures in Defendant's Exhibit NN, in his judgment, support his already given opinion that there is aggressive competition between banks. That is a matter of fact and I think he would have a right to answer that question.

Q. Would you answer the question asked by the Judge as to that as though I had asked it?

A. Yes, they indicate, as to competition between different types of banking institutions, including savings and loan, that the growth in deposits in savings banks and savings and loan institutions, both State and Federal, that that growth in those types of institutions has been greater percentage-wise than has been the growth of time deposits in national banks.

Q. Mr. Roth, is your bank subject to the rulings of the Comptroller of the Currency?

A. Yes, we are.

Q. You are subject to his jurisdiction in all respects, are you not?

A. That is correct.

Q. Have you and your bank at all times abided by his rulings?

A. Yes.

Mr. Rollins: That is objected to, if the Court please, upon the ground it is incompetent, irrelevant, and immaterial. They are citizens of the State of New York and subject to the rules and laws of the State of New York,

and no matter what the commission or the Comptroller [fol. 606] may say, if it violates the law, it is just merely advisory to them and they take the consequences if they violate it. It is not a judicial body.

The Court: Do you press that question, Mr. Grimes?

Mr. Grimes: Yes, I do, sir.

The Court: I will allow it. The question simply is, Have you obeyed all orders and directions of the Comptroller of Currency at your bank?

The Witness: Yes, we do, and if the Comptroller finds that we may be violating a State law——

Mr. Rollins: If your Honor please, may I ask the Court to have the witness refrain from volunteering any answers.

The Court: Yes, I think that is getting on a little dangerous ground there. The answer is yes. We will strike out the rest.

Q. You have understood at all times, have you not, that the Federal Reserve Act permits your bank to accept savings deposits and designates such deposits in those words?

A. That is correct.

Mr. Grimes: If your Honor please, we now offer in evidence a certified copy of an opinion in the form of a letter from the Deputy Comptroller of Currency to the Hon. John J. Bennett, Jr., Attorney General of the State of New York, dated July 10, 1939.

The Court: No objection? Mark it.

Mr. Rollins: If your Honor please, I object to the offer [fol. 607] in evidence. First of all, it is not an official document at all. It seems to me rather irregular where a department can issue a copy of a letter which purports to have been written to the present Attorney General's predecessor, and I say first of all it is not even possible of certification because the original is certainly not on file. This is hearsay, in the first place, and in the second place the opinion therein expressed is not binding upon this Court, because the statute intended to be construed, which is claimed to be a superseding statute of the Federal Reserve Act, is not ambiguous, and the decision there and the construction of the statute is a matter for judicial

interpretation by this Court, and this is an attempt to usurp this Court's functions. Before your Honor can receive the opinion or the acts of any government agent administering the agency, there must first be an ambiguity in the statute to help the Court in the construction of a statute. Your Honor must first find that. I say it is not capable of such construction unless we belabor the statute.

Mr. Grimes: May I be heard, sir?

The Court: Just let me read that.

Mr. Rollins: I submitted a brief, your Honor, on that very subject in anticipation of it.

The Court: If I want further argument, I will ask for it.

Mr. Rollins: So there will be no question about it, I will admit for the purpose of the record, to aid the Court, that [fol. 608] there was such a letter sent to the Attorney General of the State of New York—that is, the Attorney General's predecessor—the original of that offered in evidence, but that is just a matter of correspondence and the expression of an opinion, which is not controlling upon this Court. That is a construction of the statute which your Honor has to decide in this very case.

The Court: I will sustain the objection to the reception of this in evidence, but as I said with respect to the charts, that is considered opinion by an official of the United States Government and there is no reason why it could not be cited as some enlightenment on the law in question.

Mr. Grimes: Yes, we intend to do that anyway, sir. I ask this be marked for identification.

Mr. Rollins: The basis of the opinion can be cited to your Honor as a factual proposition.

(Marked Defendant's Exhibit OO for identification.)

Q. Now, Mr. Roth, I show you Defendant's Exhibit OO for identification and ask you to examine that.

The Court: If you have done it before, Mr. Roth, you can answer that you have.

A. I have.

Q. When for the first time did you see that letter from the Deputy Comptroller to the Attorney General of the [fol. 609] State of New York, about?

A. About October of 1950.

Mr. Rollins: May I make comment at this time, inasmuch as it is a lengthy record, that he certainly could not have been guided by the opinion expressed in that letter.

Q. Were there prior opinions to the same effect by the Comptroller of the Currency prior to this one?

The Court: That came to your attention.

Q. That came to your attention, yes.

A. Yes, there were some that came to my attention prior.

Q. When did the first similar opinion of the Comptroller of the Currency come to your attention?

A. About five years ago.

Q. That would be about 1945?

A. That is correct.

Q. Have you based your actions in the defendant bank upon the opinion of the Comptroller of the Currency in so far as the use of the word "savings" is concerned?

Mr. Rollins: If your Honor pleases, I object to the question on the ground it is incompetent, irrelevant and immaterial what the Comptroller of Currency or anyone else outside the State of New York thought in the enforcement of the State statutes; it is not binding upon the State of New York.

[fol. 610] The Court: That is not the purpose of the evidence. The purpose of the evidence is to negative the idea of fraud and nuisance.

Mr. Rollins: You mean on the factual element.

The Court: Fraud and nuisance.

Mr. Rollins: I wish I knew that I would be delayed all this time; I would have saved a lot of time of the Court.

The Court: Mr. Roth is being asked what was the basis of his action for using the word "savings", and his answer with respect to this part of it is that he used, not in a fraudulent way or in a way that would commit a public nuisance, but in following the views of the Comptroller of the Currency, the word "savings." That is the only purpose of that question.

Mr. Rollins: May I say that the maxim of the law that a person intends the natural objects of his act applies, and,

secondly, the act of which we complain is not excusable nor could it be estopped as against the State of New York just because someone not in authority in the State of New York told him he had the right to do so. The fact remains that he was told in 1947, admittedly so, to stop but he still challenged the State. Those letters that we have reference to and the pleadings admit the demand was made way back in 1947 for him to stop, and he says he obtained this information five years ago, but he still persists [fol. 611] in challenging it, he says as a matter of right as a Constitutional question. So, I cannot see how any fact here could be material on the questions before this Court.

The Court: I will allow the question for the purpose of showing lack of bad faith on the part of the witness and in his capacity as president of the bank in using the word "savings" contrary to the language of Section 258 of the Banking Law.

Mr. Rollins: May the record show that at least two or three of these acts, by advertisement and circular as late as 1950, show that he persisted in following that course of conduct, although the demand was made in 1947 by the Superintendent of Banks of the State of New York on that question alone, none of which has been refuted here.

The Court: All right. Let the record show that.

Mr. Grimes: I would like again to offer Defendant's Exhibit OO for identification on the question of intent only, which is all I offer it on.

The Court: Mr. Rollins, I am inclined to receive that in evidence not for its contents but for—

Mr. Rollins: Judge, I understand I am suffering under a practical difficulty. Your Honor is going to look at it and read it and possibly give it force. I realize the situation. This is not a jury trial and your Honor has recourse to look at these, and will—

[fol. 612] Mr. Grimes: We can cite it in our brief, anyway.

Mr. Rollins: —perhaps be influenced by that. I say that respectfully.

The Court: Certainly you do. I think that as long as you press that question, Mr. Grimes, I shall receive the exhibit in evidence as some proof on the part of the defendant that the defendant bank did not act in bad faith.

Mr. Rollins: May I also object to it upon the other grounds not specified, that the witness has said it only came to his knowledge in October 1950. He certainly could not have been influenced by that opinion.

The Court: He said "before."

Mr. Rollins: No, he did not say that very opinion; he said similar opinions.

The Court: With respect to this particular exhibit, the witness said, I think——

Mr. Rollins: October 1950.

The Witness: I said the first time I saw that was about October 1950.

The Court: What did you say about 19——

The Witness: I said in answer to a subsequent question that I had received and seen opinions of the Comptroller of the Currency on the same question.

The Court: Of the same tenor?

The Witness: Of the same tenor about five years ago.

Mr. Rollins: I move to strike that answer out as being hearsay and that the writing is the best evidence.

[fol. 613] The Court: Mr. Grimes, just so you will be fully conscious of the situation of the record, this letter was not seen by the witness but his testimony has been that he had seen letters similar of tenor about five years before he saw that one, which would bring it back to 1945. Now the Attorney General objects to that on the ground that——

Mr. Grimes: I withdraw the offer, your Honor.

The Court: All right. I think it will save you a little time.

Q. Mr. Roth, you are obliged to make, are you not, reports to the Comptroller of the Currency on forms provided by the Treasury Department?

A. Yes.

Q. I show you a document and ask you to state to the Court briefly what that document is.

A. This is a form which is called an earning and dividend report, which national banks are required to make to the Office of the Comptroller of the Currency twice each year.

Q. Are you required in connection with this report to state the amount of interest paid on time deposits, including "savings deposits", in those words?

A. That is correct, and those words, as stated, are printed on that report.

Mr. Grimes: I offer the report in evidence.

Mr. Rollins: That is objected to, if the Court please, being incompetent, irrelevant and immaterial.

[fol. 614] The Court: What is the purpose of that offer?

Mr. Rollins: A self-serving declaration.

Mr. Grimes: To show that we are obliged by the requirements of the Comptroller of the Currency to use the word "savings" because we are obliged to make reports on which they are printed right on their forms. We are going to show there are numerous ways in which we are required by law to use the word "savings" at this phase of the testimony. We have no choice in the matter.

Mr. Rollins: It just says the source of all revenue.

Mr. Grimes: You mean that document which you have not examined says only that?

Mr. Rollins: Whatever you label it.

Mr. Grimes: That is up to the Treasury Department, not to us.

The Court: I don't see how there can be any contention on that, Mr. Grimes. The statute itself uses the word "savings."

Mr. Grimes: Yet there is contention. That is why we are here, sir. If there were not, we would not be here.

Mr. Rollins: That is what the United States Government unfortunately labeled it. If they did not label it "savings" accounts, there would be not even room for argument.

Mr. Grimes: To say the unnecessary and the obvious, if you have the power, you may say so to the public. He [fol. 615] concedes they would not be here, so that is the exact issue.

The Court: Don't let us encumber the record by just comment at this time. You can do so much better when you put it in the form of a brief. Is this the only exhibit of this kind that you want to put in evidence, or do I understand you have many more?

Mr. Grimes: We have several more. The others relate to savings bonds, which it is our contention we are obliged to sell and to redeem and to handle, as fiscal agents of the Government. We are, therefore, obliged by the very nature of our charter and our powers and our governing body to use the word "savings" in, and in relation to, our business, both of which the State of New York says by its statute is a violation of law and we may not do and we are to be fined \$100 for each day that we do it.

Mr. Rollins: There is no such contention.

Mr. Grimes: That is what the statute says, as long as it is in our business or in relation to our business. The statute says we may not use those words. Our defense is, of course, that that statute has no application to us. That is part of our proof. There are many reasons why.

The Court: I do not read this the same way that you indicate, Mr. Grimes. This inhibition is restricted to its banking and financial business or their equivalent in [fol. 616] relation to its banking or financial business: It shall not use the word "savings." Now, I do not read from that that it is prohibited from using the word "savings" in making reports.

Mr. Grimes: Judge, may I address the Court on that subject, briefly?

The Court: Just let me think a little bit further into the application of the two. Your series of offers is to submit in evidence documentary proof that by reason of the conduct or demand of the Comptroller of the Currency that the defendant must employ the word "savings" in its reports. Is that the offer?

Mr. Grimes: Yes, sir, and that these reports are part of our banking business.

The Court: Let me see if we can obviate this instead of making a fine decision. Mr. Rollins, can you make any serious objection, in the light of the language of the Federal statute—"Continue hereafter as heretofore to receive time and savings deposits"—to the defendant showing that as a consequence of the business it has done the defendant has been compelled to account to the Federal Government under the headings wherein the word "savings" appears?

Mr. Rollins: I say it has absolutely no material bearing.

The Court: No, that is not my question. My question is: Can you have any serious objection to their putting in evidence reports wherein the defendant bank is called [fol. 617] upon to report to the Federal Government under headings and classifications wherein the word "savings" deposits—

Mr. Rollins: We still have to go to the statute. The Comptroller of the Currency is not a legislative body. No matter what he does, does not enlarge their powers.

The Court: I am just saying, do you have any serious objection to that?

Mr. Rollins: You mean as to the report? I will agree to one thing: that they did make reports. What is the use of cluttering up this record?

The Court: That is exactly what I am asking you.

Mr. Rollins: I will concede that by statutory requirement they made periodic reports.

The Court: With the word "savings," in it.

Mr. Rollins: With the word "savings" in it, that is right. I say it has no material bearing.

The Court: All right, leave out the materiality. Just that they made them.

Mr. Rollins: That is right; not under compulsion of any statute. I don't say under any compulsion of statute.

The Court: I don't think you have to say it under any particular compulsion, but then if Mr. Grimes offers in evidence these reports which are directed to the Comptroller of the Currency—is that where they go?

[fol. 618] The Witness: That is correct.

The Court: —then if Mr. Grimes offers in evidence these official forms, reports, wherein one of the classifications in each makes it necessary for the defendant bank to answer a question stating the figures with respect to savings deposits, if he offers a series of them, will you have any objection to that?

Mr. Rollins: Yes, sir, because this is another way of offering in evidence the construction of the Comptroller of the Currency as to the rights, affirmative or by implication, that your Honor excluded in the other letter offered in evidence by the Comptroller of the Currency.

The Court: No, I am not receiving in evidence the reports

on that ground. I am receiving it in this way: Here is the president of the bank commanded by Washington to make out that piece of paper.

Mr. Rollins: I say it makes no difference.

The Court: Just a moment, until you get my point. All I want the Attorney General to admit is that he had to make out that paper. Let that paper go into evidence to show what he had to make out.

Mr. Rollins: You say "had to make out" there; that is where you and I differ. I say he did not have to; he did it.

The Court: All right. Now you understand me and you cannot make that concession?

Mr. Rollins: I cannot. I did not say he had to, but I will [fol. 619] say that is the form furnished by the Comptroller of the Currency, that is as far as I will go. But I say he is not compelled by statute to do so. He is to make reports as to income and disbursements and reserves and deposits, but he is not compelled just to make a financial report as to savings banks as such, never had such power.

The Court: I will receive it in evidence.

Mr. Rollins: Exception. Does you Honor receive that document in evidence to aid your Honor in the construction of the Federal Reserve Act?

The Court: No, no.

(Received in evidence and marked Defendant's Exhibit PP.)

Q. Mr. Roth, referring to Defendant's Exhibit PP, will you now state what this is and what your requirements are with reference to it?

A. This is an earning and dividend report of the Comptroller of the Currency which we are required to fill out and forward to the Office of the Comptroller of the Currency twice each year.

Q. And among the other items you are required to state what your savings deposits are, is that correct?

A. No. We are required to report on this form the amount of interest which we have paid on time deposits, including savings deposits.

Q. The amount of interest paid on savings deposits?

The Court: The answer Mr. Grimes is soliciting is that under 2-d you are required to make an entry. Now read 2-d. [fol. 620] The Witness: 2-d reads: "Interest on time deposits (including savings deposits)."

Q. That is on the form itself?

A. Yes.

The Court: That is on the printed form.

Q. And you are required to type in or place in the answer of the amount of interest paid on your savings deposits and time deposits? Is that correct?

A. Yes, that is correct.

The Court: There is one more question, Mr. Roth. What would happen if you did not make out that report?

The Witness: We are required to make out this report and file it by a certain date. If we did not we would be violating the rules and regulations of the Office of the Comptroller of the Currency, and I don't know what would happen.

The Court: Would it be possible that under his authority—I do not know whether he has the authority or not—if you defiantly refused to send that report, could he suspend the operation of your bank?

The Witness: I wouldn't say that he could suspend the operation of the bank, but he could remove the officer in the bank who was chargeable with this duty.

The Court: All right.

Q. Now on the question of United States Savings Bonds, Mr. Roth, has your bank been asked by the Treasury Department to aid in the sale of United [fol. 621] States Savings Bonds?

A. Yes, we have.

Q. Have you done so?

A. Yes, we have.

Q. Does the Treasury Department send you advertising literature to aid in the sale of savings bonds?

A. Yes, they do, quite often, perhaps once or twice each month.

Q. This country, did you not?

Q. You heard an expert for the State testify as to the history of national banks among other types of banks in

A. Yes, I did.

Q. Why were the national banks—that is to say, those that operate under the present National Banking Act—established?

Mr. Rollins: That is objected to, if the Court pleases.

The Court: I will sustain the objection to that question.

Q. Can you state the duties, historic or otherwise, of national banks?

Mr. Rollins: That is objected to, if the Court pleases.

(Last question read by reporter.)

A. As they affect the Federal Government.

The Court: I sustain the objection.

Q. Is one of the duties of a national bank to act as fiscal agent of the Federal Government?

Mr. Rollins: That is objected to, if the Court pleases. [fol. 622] The Court: I have to sustain the objection to that because that is either a matter of law or it is not. I think we ought to get it from the law.

Mr. Grimes: May not the president of a corporation state what the powers and duties of a corporation are, sir? I really submit that he may.

The Court: Of the corporation?

Mr. Grimes: Yes.

The Court: Of his corporation.

Mr. Grimes: His corporation as a national bank. If the objection is that I am asking a question too broad in form, I will withdraw the question and ask you this:

Q. Do you know the powers and duties of your own bank, being president thereof?

Mr. Rollins: You mean in accordance with the charter of the bank or the law?

The Court: Under the law. I will allow that question.

Mr. Rollins: We all know what that is, Judge. It is encumbering the record. We will stay here a couple of more weeks. That is the only reason I am objecting to the question.

Mr. Grimes: We would get an answer if we did not have to wait five minutes in view of your objections here.

The Court : Go ahead.

A. My answer is yes.

Q. Would you state what the powers and duties of your bank are as regards the financing and financial [fol. 623] problems of the Government of the United States?

A. To act as a fiscal agency of the United States Government.

Q. Do you also have powers and duties with respect to the purchase of Government bonds?

A. Yes.

Q. Now I show you a document and ask you—

The Court : Just a moment, Mr. Grimes. I have to keep that straight. There was no objection to that, was there?

Mr. Rollins : I move that the answer be stricken out, if your Honor pleases. I thought your Honor was going to take all testimony about that.

The Court : No.

Mr. Rollins : That is the reason I did not object the last time.

The Court : I think you objected to the first question when Mr. Roth answered yes, and then you did not object to the next one.

Mr. Rollins : I thought your Honor was going to take all—

The Court : In view of the objection which I must consider went from one question to the next one, they being so closely related, I must strike out the witness's answer as to the powers and duties of the bank. I think that is a matter of law.

Mr. Grimes : I respectfully except.

Q. I show you a document and ask you what that document is.

A. That is an advertising poster which has been sent to us by the Treasury Department advertising the United States Savings Bonds.

[fol. 624] Q. Is that an official document of the Treasury Department, to your knowledge?

A. Yes.

Q. Have you displayed posters of that sort in your bank?

A. Yes.

Mr. Grimes: I offer it in evidence.

Mr. Rollins: I object to it, if your Honor pleases, being incompetent, irrelevant and immaterial. It only tends to encumber the record.

The Court: You offer that simply for the use of the word "savings"?

Mr. Grimes: Yes, sir.

The Court: I will take it.

(Received in evidence and marked Defendant's Exhibit QQ.)

Q. Has your bank also advertised in its own advertisements, that is, those advertisements paid for by it, the sale of United States Savings Bonds, in those words?

A. Yes, we have.

Q. You have used the word "savings" then in that connection, is that right?

A. That is correct.

Q. Is the sale of savings bonds a convenience to customers, that is, depositors in the bank, people who do business with the bank?

Mr. Rollins: That is objected to, if the Court pleases, being incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Is the sale of United States Savings Bonds among the services you offer to persons who deal with your bank?

A. Yes.

[fol. 625] Q. Have you in connection with deciding whether or not to sell United States Savings Bonds considered the factor of patriotism?

Mr. Rollins: That is objected to, if the Court pleases.

The Court: Sustain the objection.

Q. Have you or have you not considered what might happen in the way of a possible or probable decline of business in your bank if you refused to accede to the request of the Treasury Department to sell savings bonds?

Mr. Rollins: That is objected to, if the Court pleases, as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Is your bank paid for the redemption of savings bonds?

A. Yes, we are, a fee of ten cents per bond up to a thousand bonds redeemed, and thereafter at the rate of seven cents per bond.

Q. Does your bank sell savings bonds as a part of its business?

A. Yes, we do.

Q. How long have you done that?

A. Ever since the Government has permitted banks to sell those bonds, which goes back to about 1939.

Q. Has the Government requested your bank to inaugurate payroll savings purchase plans?

A. Yes, it has.

Q. Has your bank done so?

A. Yes, we have.

Q. Has that formed a considerable part of the business of your bank?

A. No, I wouldn't say it is a considerable part of the business of the bank, but we have a fair volume of such accounts.

[fol. 626] Q. What does the payroll savings purchase plan require? I mean, that is in relation to the purchase by persons of United States Savings Bonds by deduction from their payroll, is it?

A. By deduction from their payroll, an accumulation of such funds until the employee has an amount sufficient in the account to permit him to purchase a savings bond, at which time we charge the account with the amount due on the bond and issue the bond to him.

Q. So, up to the time of purchase that becomes a deposit in your bank is that correct?

A. That is correct.

Q. I show you a document and ask you whether that is a Government form.

A. Yes it is.

Q. Is this a form supplied by the Government in connection with payroll savings purchase plans?

A. Yes, it is.

Q. In fact, is this a form which has actually been filled in and used by your bank?

A. That is correct.

Mr. Grimes: I offer it in evidence.

Mr. Rollins: That is objected to, if the Court please, being incompetent, irrelevant and immaterial.

The Court: Where do you get this form, Mr. Roth? Make it up yourselves?

The Witness: May I see that, your Honor? Mr. Green may be able to answer that. I don't know.

The Court: I would think we would have to know the source before I could receive that in evidence. I will take in evidence anything that the United States Government [fol. 627] officially uses wherein the word "savings" is used.

Mr. Grimes: Mr. Green informs me that this is an official Treasury form. Now I can swear Mr. Green as a witness if it is necessary to do so.

The Court: Do you require that, Mr. Rollins?

Mr. Rollins: I don't know, I really don't. If I knew, I would stipulate, but I don't.

The Court: The witness here does not know of his own knowledge and conscientiously he does not want to say so, but we now have it from the vice president of the bank.

Mr. Rollins: I cannot concede that it has any relevancy or materiality.

The Court: Not the relevancy. Just is it an official document?

Mr. Rollins: I don't know, Judge. I tell you frankly, myself, I don't know.

The Court: Would you stipulate that if the vice president of the bank, Mr. Green, were recalled, his testimony would be that this is an official form which he receives from the Comptroller of the Currency and is required to use in his bank in keeping the records in respect to this payroll savings plan?

Mr. Rollins: I would stipulate that he would so testify, without admitting the truth thereof, inasmuch as I have no way of contradicting it.

The Court: All right. Now do you want to offer it in evidence?

[fol. 628] Mr. Grimes: Yes, sir. Thank you.

The Court: It is received in evidence. The Attorney General has objected to it, the usual objection. I have overruled it. This is received in evidence to show that the Federal Government itself makes use of the word "savings" in its official records, with respect to the defendant bank.

(Received in evidence and marked Defendant's Exhibit RR.)

Mr. Rollins: When your Honor says the United States Government, you do not say the source, you know. Your Honor made comment that the United States Government did. I don't know whether the United States Government did or not. Some member of some agency did.

The Court: I will change that to some agency of the United States Government. We will make it the Comptroller of the Currency uses the word.

Mr. Grimes: Treasury Department also, and that is the Government, or the Government is its agencies, bureaus, et cetera.

Q. I show you four more documents and ask you whether those are official Government documents, whether from the Treasury Department, the Comptroller of the Currency, or any other agency, branch, bureau or subdivision of the United States Government, furnished you in connection with a request that you distribute those for the purpose of aiding in the sale of the United States [fol. 629] Savings Bonds.

A. Yes. We received all of these forms from the Treasury Department and they are all used in connection with the sale of United States Savings Bonds.

Q. And you have used them in that connection, is that right?

A. And we have so used them.

Mr. Grimes: I offer them in evidence.

Mr. Rollins: That is objected to, if the Court pleases. It is incompetent, irrelevant and immaterial. The objection in this complaint, may the record show, is to the method of

soliciting bank accounts for their time deposit department, and not to the distribution of any literature for the United States Government in connection with the Government's business.

The Court: I receive these in evidence for the purpose of showing that the United States Treasury Department uses the word "savings" in its literature which it sends to the defendant bank and requires the defendant bank to use in its local business.

(Received in evidence and marked Defendant's Exhibit SS.)

Q. Do you know of any way in which you or your bank could in any way perform this function for the Federal Government—that is to say, the sale of United States Savings Bonds—without using the word "savings"?

Mr. Rollins: That is objected to, if the Court please, [fol. 630] being incompetent, irrelevant and immaterial what this man knows, unless we assume he knows everything. May the record also show that there is no proof in the record here that the State of New York ever objected to such advertisement by the United States Government through this defendant or any other person.

Mr. Grimes: May the record show that the statute prohibits the use of the word "savings" in their business. He has testified these matters were in connection with their business. That is what I want the record to show.

Mr. Rollins: They are the fiscal agents of the Government, so they certainly could not be in their business and the Government's business.

The Court: The question was, do you know of any way that you could conform to this line of business and prosecute it for the benefit of the Government without using the word "savings"? Is that your question?

Mr. Grimes: Precisely.

The Court: Of course, referring to this sale of United States Savings Bonds.

Mr. Grimes: That was my question, yes.

The Court: I will allow the question. Do you know of any way?

The Witness: No, I do not know of any way that we can sell these bonds without the use of the word "savings". As a matter of fact, they are commonly referred to as savings bonds.

Mr. Rollins: Will your Honor take note of the [fol. 631] exhibit there—what is the number of that poster?—that says United States Savings Bonds as distinguished from Savings Bonds itself? "United States" in front of it.

The Court: All right.

Q. Section 258, of course, to your knowledge, permits savings and loan associations to use the word "savings," is that correct?

A. That is correct.

Q. You have testified that you were in competition with savings and loan associations; that is correct?

A. Very keenly in competition with them.

Q. Would you state the precise manner in which you were in competition with savings and loan associations in Nassau County?

Mr. Rollins: If your Honor pleases, for the purpose of the record I object to the question, upon the ground it is incompetent, irrelevant and immaterial.

The Court: What do you expect as an answer to that? You mean the word "advertising"? Would that be an answer?

Mr. Grimes: I am trying not to lead the witness. I have tried to ask him questions which he might respond to without leading. Now, I can go down, categorize each element.

The Court: If I knew what you expected in the way of an answer, I could rule.

Mr. Grimes: Yes, your Honor. I will make an offer of [fol. 632] proof at this point. I offer to prove through this witness that they are in competition with a number of savings and loan associations in Nassau County; that that competition consists of two general divisions: one, competition for people's money for deposits, and, two, competition in connection with the investments which they may make, because investments bear upon interest and interest bears upon the competition. I expect him to testify and to delineate various matters, whether by advertising or other-

wise, in which his institution is in competition of that nature with savings and loan associations in Nassau County and, to some extent, elsewhere. That is the subject matter that I wish to go into, and I can start piecemeal and lead or I can do anything, but we are moving along, I agree, very slowly. I would like to bring this to a close if we possibly could, sir, I agree with the Attorney General, and I am sure those are the Court's wishes in that respect, and I would like to get this into the record.

The Court: You have devoted so much conscientious time and effort to this that we must not do anything toward the end now, just for the sake of spending a little bit more time, preventing you from making the perfect record that you wish to make. So, although we are getting toward the end of it, we must not try to hurry; it does not pay.

Mr. Grimes: Very well, sir.

The Court: The witness has testified and it is [fol. 633] in the record here that the defendant bank is in aggressive competition with the savings and loan associations. Now, your question is, practically, How does that competition arise?

Mr. Grimes: That is correct.

The Court: Mr. Roth, now I think I will allow you to answer that question, giving your views from your own viewpoint, that is, as the president of the bank and not as to the effect upon the public. Can you make that distinction?

The Witness: Yes, I can, I believe.

The Court: If you will answer it that way, I think it is all right.

The Witness: Savings and loan associations aggressively advertise for deposits, as they call them, in newspapers, periodicals, direct mail, radio, and various other sources of advertising. They likewise aggressively seek through the same channels mortgage loans, which is in competition with our institution.

Q. Do they pay a higher interest rate, or rather a higher dividend rate, as they call it, generally, than your bank?

A. Yes, they do.

The Court: And you pay interest?

The Witness: And we pay interest on our savings deposits. They pay dividends to their shareholders.

The Court: The comparison is dividend against interest?

The Witness: Yes.

[fol. 634] Q. Are there any factors which permit them to do so, in your knowledge?

A. Yes, there are many factors which allow a savings and loan association to pay a higher interest rate than we can pay, and some of those factors are that—

Mr. Rollins: I object to what the factors are, if your Honor please, being incompetent, irrelevant and immaterial.

The Court: I think that that goes as far as the witness ought to be allowed to go. Try to concentrate on the issues we have here. I think that I will sustain the objection to the answer going any further on that particular matter.

Mr. Grimes: I understand that ruling, then, as directed to savings and loan associations on the matter of competition.

The Court: No, just this part where Mr. Roth started to say what those factors are in the savings and loan associations. I don't want to get into that because that may raise a controversy that would bring to this Court other representatives of *savings* and loan associations as to the factors that motivate the company, and that is not what this lawsuit is about.

Mr. Grimes: That is true, your Honor. I wanted merely the bearing upon competition and the advantages they have, and as bearing upon the higher interest rate and as bearing, in turn, upon the necessity for our not being impeded in any way in our advertising. That is the purpose of the offer.

[fol. 635] The Court: I think when the witness has testified to their manner of advertising for deposits, he has covered the competition point that bears upon this case. As to that manner of advertising for deposits, the purpose of his testimony is to show that it excludes the defendant bank from deposits that otherwise it would have if it were allowed to use the word "savings" as the loan associations are allowed to use it.

Mr. Rollins: If your Honor pleases, if that is the purpose and motive, I move that the answer be stricken out, upon

the ground it is mere speculation and there is no basis for such a conclusion or opinion that could be expressed by this witness.

The Court: No, I will let the answer stand up to that point.

Mr. Rollins: Exception.

Q. Do savings and loan associations in their advertising generally use the word "savings"?

A. Yes, they almost always use the word "savings".

Q. You understand me to mean in their advertising for people's money for investment on which they offer to pay a dividend, do you not?

A. I understood it as such.

Q. Now, do not answer this question until his Honor, the Judge, has ruled: Are they exempt from paying Federal income tax?

Mr. Rollins: I object to that, if the Court please. This man is not qualified; he is not a lawyer.

[fol. 636] The Court: I would have to sustain the objection to that. That is a question of law.

Q. Are savings and loan associations permitted to invest all of their assets in real estate mortgages?

A. Yes, they are.

Q. Are they permitted to make mortgage loans up to 80 per cent of the appraised value of properties, whereas national banks are limited to 60 per cent thereof?

A. That is correct.

Mr. Rollins: I move the answer be stricken out, because they are subject to two different regulations, one by the United States Comptroller of the Currency and the other one by the State law, and if any inference is intended to be shown that one is hampered by the other, it is as a result of the United States' strangulation by its regulation, not by the State of New York, and it has no bearing, therefore, on the case. I move that the answer be stricken out.

The Court: I will deny the motion on that ground.

Q. Are national banks required to maintain reserves with the Federal Reserve Bank?

A. Yes, they are.

Q. To what extent?

A. To the extent, in the case of our bank, of 14 per cent on demand deposits and 7 per cent on time and savings deposits.

Q. Do you receive any interest on such——

A. No, we receive no interest on those moneys.

[fol. 637] Q. Is there any similar requirement imposed upon savings and loan associations?

A. No.

Mr. Rollins: If your Honor pleases, I object to this witness's testimony.

The Court: I will sustain the objection.

Q. How many savings and loan associations are there in Nassau County?

A. Approximately fifteen.

Q. How many savings banks are there in Nassau County?

A. One.

Q. Is your bank in competition for deposits with the savings banks in New York City?

A. Yes, we are. They advertise in Nassau County.

Q. As regards competition between your bank and savings banks chartered by New York law, are savings banks required to pay any Federal income taxes?

Mr. Rollins: That is objected to as not being within the knowledge of this witness.

The Court: Sustained. It is a matter of law.

Q. To what extent are they permitted to invest in real estate mortgages?

Mr. Rollins: That is a matter of law, if your Honor pleases, and I object to it. That is all a matter of law.

The Court: Is that a matter of law?

Mr. Rollins: We have it in evidence.

Mr. Grimes: These things are also so obviously matters of fact, too, that I think this witness can testify to them, [fol. 638] in view of the fact that he is testifying as a bank president as to competition.

The Court: If it is a matter of law, I must exclude it.

Mr. Grimes: Even though it is also a matter of fact?

The Court: If it is a matter of law, it is a matter of law.

No matter whether it is a question of fact, if it is a question of law there is no use in asking the witness about it.

Mr. Grimes: I respectfully except to your Honor's ruling.

Q. Mr. Roth, is advertising essential to your business, would you say?

A. Very definitely it is essential to our business and the growth of our business.

Q. Could you state in what respects it is essential?

The Court: There do you mean to attract deposits or to attract investors?

Q. We are discussing, you understand, the attraction of deposits to your bank. In what respect is advertising essential, as you have testified, to your banking business?

A. It is essential in order to attract deposits to our institution.

Q. Mr. Roth, have you studied the problem of what terms to use in advertising in order to describe the service which your bank renders of receiving deposits for safekeeping and paying interest on them?

A. Yes, I have.

Q. For how many years would you say you have studied that problem?

A. I have in particular studied that problem since [fol. 639] I have been with the Franklin National Bank, and that goes back to 1934.

Q. Now based upon your experience in connection with your study of the problem, have you formed any conclusions as to various words to indicate that your banking institution is offering the service of accepting people's money for safekeeping and paying a return on it?

A. Yes, I have.

Q. What conclusions have you reached?

Mr. Rollins: If your Honor pleases, I object to the answer. This man is not a qualified advertising man. It would be a one-man opinion.

Mr. Grimes: That is all any expert's opinion is. We hear one man at a time, you know.

Mr. Rollins: And without any facts in evidence.

The Court: I think I will have to sustain the objection to that question.

Mr. Grimes: Sir, you will not permit him to testify as an expert on an essential part of his business, advertising?

The Court: You have asked him what conclusion he has arrived at.

Mr. Grimes: In connection with words used for advertising purposes to describe this service.

The Court: I do not think he can answer that question.

Q. Have you formed an opinion as to the usefulness of [fol. 640] the word "savings" in connection with advertising this service?

A. Yes, I have.

Q. What is that opinion?

Mr. Rollins: That is objected to, if the Court pleases. That is a phrase coined by savings banks long before commercial banks had time deposits.

The Court: I think, Mr. Grimes, that you are treading on a very important border-line part of your case right here. I can see reasons why Mr. Roth ought to be allowed to answer that question. I think he is qualified to answer it. But you are getting dangerously close to having the witness answer the question which the Court is charged with the duty of answering. If you follow along that question, if this witness says the use of the word "savings" in our advertising is absolutely essential to fulfilling the commitment for which we were organized, then you are arriving at an interference by the State with the Federal command to this bank of what kind of business it will do. As I say, I am in doubt about it. If you wish to assume the responsibility and press the question, I will allow Mr. Roth to answer. I admit this: that I will, and I think any other court that passes upon this record will, answer that question on the facts as we have them in the record.

Mr. Grimes: Your Honor, may I just say this at this point, in view of what you have said: We believe that this case could be decided as a matter of law. In view of the [fol. 641] peculiar nature of the statute, it has seemed to us all along—and we have presented our case upon this theory—that while the Court could decide this case, we might think very well, as a matter of law, there is also a question of fact involved and we have not been content to

rest solely upon a matter of law, because it might require the Court to take judicial notice of things that the Court might not wish to take judicial notice of. Hence, we have wished to prove several basic points: one, that the competition for people's money by way of deposits is very keen; two, that advertising is essential to get those deposits in a keenly competitive market; and three, that there is a difference in the effectiveness of the various words used and various terms used. That we regard as a matter of fact. When it comes to a question of proving the effectiveness of various words, we can only prove them by experts, perhaps witnesses called directly or, in the manner in which we have done, by a survey. When I ask Mr. Roth this question, I am asking him the question as an expert and as a matter of fact, and only in that sense. It is not our purpose to impinge in any way upon what is the Court's province. But, there it seem- to me, is a dichotomy here or a bifurcation here. One part is concerned with the law, but in the other part we are addressing ourselves solely to fact. Certainly, it can be a matter of fact in a competi- [fol. 642] tive field whether one word has greater pulling power than another, whether one word is almost universally understood and another set of words or terms not understood. It is only in that respect, which I regard as completely factual, that I ask the witness this question. It is not for the purpose of impinging at all upon the province of the Court.

The Court: Let me draw to your attention another angle that you may be overlooking. Expert testimony is only received where the Court or jury needs the assistance. If it does not need the assistance, a jury may entirely disregard expert testimony and decide the issue on its own knowledge and on the evidence it heard on the trial.

Mr. Grimes: Yes, I thoroughly agree with that.

The Court: Now, with respect to the Court—

Mr. Grimes: We can only offer in view of and on that point of law. That is correct.

The Court: Your difficulty here is that when you get this answer it is made before the Court, and if we have erroneously admitted that answer, the courts may be persuaded enough by that answer to jeopardize your whole

decision. As I said, I have a very clear view about what to do if you press it, but I wanted you to know the responsibility, and I say again that the facts in the case produce the answer which I think your witness is going to make. [fol. 643] All of your witnesses, all of your tables and your records have indicated the answer that you want this witness to make just categorically. Now that is just my view of it.

Mr. Grimes: Very well, sir. I shall not press it, in view of your Honor's statement.

Mr. Rollins: Then, may I make this observation, now that your Honor has given his opinion on the situation: It is not so much whether it be more convenient if you could do more business if you were permitted to use the word "savings." Assuming, but not conceding, that to be a fact, the question is, Does the denial of the use of such words tend to impair the efficiency of the national bank?

The Court: I think that is a correct statement.

Mr. Rollins: That is what it is. Just merely saying he could do a little bit more business if he was not hampered by that regulation does not give him the right to contend that the law is unconstitutional, that is the State law.

The Court: All right.

Mr. Rollins: That is the effect of all the proof they have offered, especially in the face of all the other evidence showing that national banks enjoy billions of dollars of time deposits. They must have gotten it through advertisement, because this witness himself said it is the means of obtaining that business and only through that means.

The Court: Now let us go along.

[fol. 644] Q. Mr. Roth, can you state the approximate percentage of savings deposits in your bank which come from Nassau County?

A. Yes. Approximately 98 per cent.

Q. What is the lowest amount which a person may open a saving account with in your bank?

A. One dollar.

Q. May anybody open a savings account for one dollar in your bank?

A. That is correct.

Q. As a matter of business policy, does your bank regard all of Nassau County as a potential market for it?

Mr. Rollins: That is objected to, if the Court pleases.

The Court: I will allow that.

Mr. Rollins: The other forty-six banks do.

A. Yes, we do.

Q. There are some forty-six other banks in Nassau County, too, is that correct?

A. Forty-six banks and some fifteen savings and loan associations and one savings bank.

Q. You do regard Nassau County as your market area?

A. That is correct.

Q. And you do some business outside of Nassau County, do you?

A. A small amount.

Q. Most of your banking business is in Nassau County?

A. Practically all of it is in Nassau County.

Q. Mr. Roth, we have put in evidence here—and I don't think we can put our hands on the exhibit right now—an exhibit of which this is a copy——

[fol. 645] The Court: Show him the copy. You do not have to have the original.

Mr. Grimes: May the record show that that is a copy of an exhibit which is in evidence but which we do not have at the moment, being, we believe, Defendant's Exhibit AA.

Q. Referring to what we mean to be Exhibit AA, from the standpoint of the banking and the public, in your opinion are those definitions accurate and fair?

Mr. Rollins: That is objected to, if the Court pleases. This man is not qualified.

The Court: These are the standards that the witness testified to.

Mr. Grimes: That is right.

The Court: I will sustain the objection. It is in the evidence already.

Mr. Grimes: All right.

The Court: One of these witnesses testified that those were the standards that they used in the poll.

Q. Do other commercial banks in Nassau County, to your own knowledge, permit accounts to be opened for as little as

one dollar, that is to say, passbook accounts of interest-bearing accounts?

A. To my knowledge all of them permit accounts to be opened for one dollar.

Mr. Grimes: Now may I ask this witness to comment in his expert capacity upon the results of the Hofstra poll?

The Court: I would exclude it.

[fol. 646] Mr. Grimes: No further questions.

Mr. Rollins: May I ask for a five-minute recess?

(Recess.)

Mr. Grimes: If your Honor please, I offer in evidence copies of letters dated June 5, 1947, and March 29, 1947, written in reply to—

Mr. Rollins: Plaintiff's Exhibits Nos. 15A, 15B, and 15C.

Mr. Grimes: Thank you.

Mr. Rollins: No objection.

(Received in evidence and marked Defendant's Exhibits TT and UU, respectively.)

Cross-examination.

By Mr. Rollins:

Q. Mr. Roth, you said, if I recall—if you did not say it, correct me, please—that savings accounts are included in the term "time deposits," is that correct?

A. I did say so.

Q. And that is a fact, isn't that right?

A. That is a fact.

Q. So there is no distinction between the term "savings deposits" as such and "time deposits," is there?

A. Yes, there is a distinction, in that savings deposits are a particular type of deposit.

Q. Time deposit, you mean.

A. Whereas time deposits, the term "time deposits" is an all-inclusive term which includes savings deposits, time certificates of deposit, time deposit open accounts, Christmas Club deposits, and various other types of time deposits.

[fol. 647] Q. Mr. Roth, in maintaining these time deposits, usually conducted in savings banks, passbooks are required to make a deposit and withdrawal from such accounts?

A. That is correct.

Q. Is there any difference with reference to your time deposits in your bank?

A. You mean as to the issuance of a passbook?

Q. As to a passbook.

A. No, our passbooks are quite similar, almost identical to the passbooks issued by savings banks.

Q. In other words, no depositor in your savings account department of your bank could make a deposit or withdrawal in such account? Am I correct in making such a statement?

A. No, I don't follow you on that.

Q. Could a depositor in your savings department make a deposit of moneys or withdrawals without presenting the passbook for such deposit or withdrawal?

A. The passbook is required but there are exceptions made with the approval of an officer, especially with regard to withdrawals only; but deposits may be made in both savings banks and in commercial banks without a passbook.

Q. You mean is that the exception?

A. The exception that has to be approved by an officer is when a withdrawal is made without the presentation of a passbook.

Q. How about a deposit?

A. In the case of a deposit the tellers themselves are permitted to accept deposits without the presentation of a passbook.

Q. Could that be done in a savings bank, if you know?

A. Yes, and a duplicate deposit ticket is given to the customer in lieu of the passbook.

[fol. 648] Q. When you worked for the Manufacturers Trust Company did the Manufacturers Trust Company have a time deposit department?

A. Yes, they did.

Q. And the Manufacturers Trust Company during your

time there and at the present time is still a New York State commercial bank, is that right?

A. That is correct.

Q. It is not a national bank, is that right?

A. No, it is not a national bank.

Q. What term did they use to advertise and solicit time deposits?

A. I believe they used the term "thrift accounts."

Q. Did they advertise for deposits in their time deposit department in the newspapers in the City of New York extensively by the use of the term "thrift account"?

A. I believe they advertise for such. Whether or not they advertise extensively I couldn't say at this time.

Q. Did they use the word "thrift" in their advertisements?

A. Yes, they used the word "thrift account."

Q. Did they use other media of advertisement in a solicitation of this time deposit for its time deposit department?

A. I believe that they may have used the statement envelopes—at least to state at the end of each month when they send statements to their checking accounts, they may have inserted circulars from time to time advertising the services of their thrift department.

Q. Is the Manufacturers Trust Company one of the larger banking institutions in the State of New York?

A. Yes, it is.

Q. Do you know how much their time deposits amount to, approximately?

A. As I recall, it is over 400 million.

[fol. 649] Q. That is in dollars, is that right?

A. 400 million dollars, that is right.

Q. Do you know how many depositors they have, approximately?

A. No, I do not.

Q. What is the usual average depositor in a time deposit in a commercial bank?

A. Savings bank runs around \$1,500, and in a commercial bank it might almost run as high, usually it doesn't. In our particular case it runs around \$1,000, and I wouldn't know what it is in Manufacturers Trust Company.

Q. Would that be much of a difference for the Manufacturers Trust Company?

A. No. I would say it would be substantially the same.

Q. About \$1,000 average for each account?

A. Approximately.

Q. The Manufacturers Trust Company, by that calculation, enjoys about 400,000 depositors for their time deposit or, to use another term, saving deposit department; is that right?

A. On the basis of your calculation, that is right.

Q. You would not say that that is by the use of the term "thrift account," would you?

A. That is by the use of the term "thrift account."

Q. That is your answer? That is, the answer is yes?

A. In advertising, yes, and in the circulars that I mentioned, yes, but it was quite different when we solicited these accounts in many of the new business campaigns and spoke to those people who came to the bank in order to open time accounts which would bear interest. Our explanation then was a little different than the use of thrift accounts.

Q. In the Manufacturers Trust Company, in their time deposit department they had these cages where they re-[fol. 650] ceived these deposits and where withdrawals were made, isn't that correct?

A. Yes, that is correct.

Q. Did they have that particular department labeled over the cage?

A. I believe in many of the branches they had the words "Thrift Department" over the cages.

Q. They did not have the word "savings," did they?

A. No, they did not display the name "savings" anywhere in the bank.

Q. Do you know what the time-deposit amount in the National City Bank is?

A. It is a little more than Manufacturers Trust, as I recall, perhaps 10 or 15 per cent higher.

Mr. Grimes: May I say, when the witness answers a question about the time deposit, he means the interest-bearing passbook accounts, because he has testified there is a difference.

Q. You understand by my question I mean passbook accounts, do you not?

A. Yes, I do understand that, but we are talking of the term "time deposits" and, as I mentioned before, in New York City banks they have a higher percentage of non-saving deposits included under the term "time deposits" than do the banks outside of the City of New York.

Q. In the National City Bank, when you say about 15 per cent higher than the Manufacturers Trust Company, you would say it would be over 500 million dollars, isn't that correct?

A. It isn't over 500 million, as I recall it, but it is between 400 and 500.

Q. Million dollars?

A. Million dollars.

[fol. 651] Q. And based upon the calculation, that would represent between 400,000 and 500,000 depositors, is that right?

A. That is correct.

Q. What term do they use in advertising and soliciting accounts?

A. In advertising accounts they use the written word "special interest," but when you ask me soliciting accounts, their solicitors tell people, "This is the same as a savings account, this is a savings account."

Q. That is just merely what someone had told you, isn't that correct?

A. I used it myself when I was with Manufacturers Trust Company and was called upon to explain to people why it was called a thrift account when people came to the bank to open a savings account.

Q. Do any commercial banks, to your knowledge, use the radio or television?

A. Yes, many of them use it at the present time.

Q. A national bank, as you understand, is included in the general heading of commercial banks?

A. Yes, it is a commercial bank.

Q. When you used the term "competing," did you mean to convey the thought that you sought deposits for your savings department? Is that what you meant by the word "competition" with other banks?

A. I meant that there were individuals who had money available to deposit on a time basis and we competed with other individuals, with other institutions for that person's money.

Q. And that is the extent to which you used the word "competing"?

A. When we talk of savings deposits.

Q. That is what I mean, savings deposits. Did you intend to convey that you tried to take customers away from [fol. 652] other banks?

A. Oh, yes, very definitely.

Q. By the word "competing"?

A. That is part of it also.

Q. Commercial banks as a rule in the last five years have paid interest, other than your own bank, at the rate of 1 per cent per annum on their time deposits, I mean passbook accounts?

A. Well, they have paid various rates on their savings deposits. I believe the 1 per cent rate is about the average rate.

Q. Your bank is the one that pays 2 per cent, is that right?

A. We pay 2 per cent from day of deposit.

Q. Do you know what rate the National City Bank is paying?

A. One and a half per cent.

Q. Do you know what rate the Manufacturers Trust Company is paying?

A. One per cent.

Q. Do you know what rate savings bank deposits?

A. Savings banks pay?

Q. Interest, yes.

A. Yes, 2 per cent.

Q. From your experience as a banker it is natural, is it not, for a person who seeks to invest his money by way of deposit in some time deposit account to be anxious to get as much interest as possible, isn't that right?

A. Yes, that is correct.

Q. And that, of course, if consistent, you will agree, with safety for their investment?

A. That is correct.

Q. Naturally, the reputation of the bankers measure in a great way for a depositor to use that particular bank, isn't that right?

The Court: Mr. Rollins, you say—Excuse me. Read the question.

(Last question read by reporter.)

[fol. 653] Q. In other words, a person who is seeking to make a deposit of money on interest not only looks for as much interest as he can but also is concerned about the reputation and integrity of the persons behind the banking institution, isn't that right?

A. Yes, that is an important element also.

The Court: Mr. Rollins, my interruption was to find out how much longer you think you will be with Mr. Roth.

Mr. Rollins: Very shortly, sir. I do not see how I can say much more. Most of the facts testified by this witness—

The Court: What do you mean—much longer?

Mr. Rollins: I hate to make a prediction.

The Court: No, I do not want you to. I just have to make arrangements with my staff.

Mr. Rollins: I do not think I will take a half hour, if that much.

(Recess.)

Q. How many passbook depositors has the defendant?

A. About 30,000.

Q. I show you Defendant's Exhibit NN, calling your particular attention to Exhibit A, the first page thereof, and I ask you to note the time deposits in commercial banks in Nassau County for the period mentioned therein between 1945 and 1949, and ask you to specifically note the figures of \$167,694,000 for the year 1945, the sum of \$187,534,000 for the year 1946, and the sum of \$192,853,000 for the year 1947, and the sum of \$196,738,000 for the year [fol. 654] 1948, and the sum of \$209,950,000 for the year 1949. About how many depositors would you say represented these time deposits?

The Court: Each year, do you mean?

Q. Each year.

A. Well, on an average of \$1,200 per account, or to make it more simple, \$1,000 per account, you have—

The Court: He can compute that. On a unit of \$1,000 per account.

Q. For the year 1949, let us take the figure of \$209,950,000. About how many depositors would you say on time deposits by book account would that represent?

A. Once again, we are a little bit confused because we are talking about time deposits, and I mentioned before—

Q. What you call savings—

A. You see, we have to take out of these time deposits those deposits which are not savings deposits.

Q. How much would you estimate represented time deposit accounts out of the 200-odd million for the year 1949 by passbook accounts, outside of this corporate business?

A. In Nassau County it might run about 75 per cent of the 200 million dollars would be savings accounts.

Q. About how many would you say deposit?

A. And that would be 150 million.

Q. How much would it be in depositors?

A. Well, \$1,200 an account; it might be 125,000 accounts.

Q. And that is all for Nassau County?

A. And that is Nassau County exclusive of the savings and loans and the savings bank.

[fol. 655] Q. That is for all commercial banks?

A. That is correct.

Q. And that is inclusive of national banks?

A. And that is inclusive of national banks.

Q. Commercial banks of the State of New York are on the same par with national banks, as far as you know, isn't that correct, with respect to restriction and regulation—Question withdrawn.

Q. All enterprise properly run for profit requires advertising, more or less, isn't that correct?

A. That is correct.

Q. It is the accepted method of marketing commodities, isn't that right?

A. That is correct.

Q. And banking is no exception?

A. Correct.

Q. Sale of security the same thing, isn't that right?

A. That is correct.

Q. You won't challenge my statement if I said that the public could be educated to understand what trade terms represent, would you, such as Four Roses, meaning rye liquor, would you?

A. If you spend enough money on that advertising.

Q. Assuming that you spend enough money.

A. I think if you spend sufficient money, yes.

Q. That could be done also by handbills, isn't that right?

A. Oh, no, I wouldn't say by handbills. I would say in order to make the public fully cognizant of learning a new trade term and a difficult one, you would have to use all forms of advertising so that you would reach all people.

Q. Assuming that is done, the public could, as an intelligent public, understand that the term Four Roses, assuming that it is properly advertised to the full limit, represents liquor; the public could be made to learn that, isn't that right?

A. That is possible.

[fol. 656] Q. And that has been done with that particular commodity today, isn't that right? It is generally understood to mean that Four Roses is liquor, isn't that right?

A. I think so.

Q. The same thing obtains with the advertisement by use of the term LS/MFT, isn't that right, meaning Lucky Strike cigarettes?

A. That is right.

Q. And that has become universally known to represent Lucky Strike Cigarettes, isn't that right?

A. That is right.

Q. By the slogan in advertising, "Be Happy—Go Lucky", the term suggests to the public mind Lucky Strike cigarettes, does it not?

A. That is right.

Q. There are a lot of other commodities which have been similarly advertised?

A. That is right.

Q. So that even though the trade name does not suggest

the product, the public has begun to learn that it means a definite commodity, isn't that right?

A. That is right.

Q. The same thing could be done with the term "thrift", could it not, under the same conditions and circumstances?

A. No, I don't think you could exactly do it with thrift.

Q. Why?

A. Because when you advertise LS/MFT, for instance, you always refer to cigarettes, you talk about cigarettes; but when you want us to advertise a word "thrift" and get the public to generally know—

Q. I am talking about thrift account.

A. —that thrift account is a savings account, you must always say this is a savings account, and you are prohibited from using the word "savings" under your interpretation.

[fol. 657] Q. Let us see if that is so or not. Savings banks existed long before commercial banks accepted deposits, is that not right?

A. That is right.

Q. That is of similar deposits?

A. Yes.

Q. How much longer?

A. You mean—

Q. In point of time.

A. —have they been permitted to take savings deposits as such than savings banks?

Q. That is right, how much longer?

A. Of course, national banks have always accepted time deposits and they have always accepted certificates and savings accounts, but the law was never clear on the fact that they could use the word "savings".

Q. The regulation of savings banks with reference to the subject matter of this litigation was enacted in 1872—I am referring specifically to Section 258 of the Banking Law—is that right?

A. Yes.

Q. Prior to that particular time, savings banks existed as such, did they not?

A. That is right.

Q. And commercial banks at that time did not in any great degree receive passbook accounts, did they?

A. Well, they accepted time deposits, they accepted the savings of people.

Q. Not on the passbook basis, did they?

A. No, but—yes and no. Some on a passbook basis and others on what was called a certificate basis.

Q. But it was not to the same degree as it is in recent date, from the beginning of 1920?

A. No, not since the clarification of the powers of a national bank in 1926 or some such date.

Q. So, from early date people had begun to know that savings banks were such by the use of the word “savings” [fol. 658] bank or advertisement using the word “saving” or “savings”?

A. Well, you are trying to imply that savings banks coined the word “savings” and they were the ones—

Q. But they used it in their advertising, isn't that right?

A. Yes. Of course, Benjamin Franklin always used to refer to the word “save” very much long before the time of savings banks.

Q. But at the time of savings banks, in their history and antedating the commercial banks' time deposits by passbook, as we now know, savings banks had been engaged in accepting savings accounts, had they not, by advertising the term “savings” or “saving”?

A. Yes, that is right.

Q. Would you say that your bank during the last five years was enjoying good business?

A. Yes, I would say that.

Q. I call your attention to Plaintiff's Exhibit No. 36 showing the record of growth of the defendant and ask you whether or not the record of growth therein stated is true.

A. Yes, it is.

The Court: He will answer yes to that.

Mr. Rollins: All right. This is a printed form. I just wanted to make sure. I asked the vice president, but he is the president.

The Court: All right.

Q. As of December 31, 1933, the defendant had an undivided surplus of \$123,437.08, is that correct?

A. Capital surplus—

The Court: Mr. Rollins, those being in evidence, what is the use of asking the witness all over again?

[fol. 659] Mr. Rollins: I am frank to say I just wanted to call your Honor's attention to it.

Q. As of December 31, 1950, the capital surplus of undivided profits is \$5,022,898.49?

A. That is correct.

Q. And that is a pretty good record of accomplishment, is it not?

A. You cannot—

Q. Yes or no.

A. I don't want you to feel that all that is through earnings, because a great deal of it came through the sale of new stock and also through the acquisition of South Shore Trust Company and their capital of \$1,600,000.

Q. When you use the word "surplus", does that not mean over and above capitalization?

A. Yes, over and above capital stock.

Q. Take December 31, 1949, where the undivided surplus therein reported is \$2,845,385.74.

A. Yes.

Q. What part of it represented earnings other than the sale of stock?

A. Well, on that same report that you refer to we have a report of all of our income and expenses for the year 1949, and it indicates that our net earnings before taxes were \$851,000, our reserve for taxes was \$270,000, leaving net earnings after taxes of \$581,000.

Q. On a capital of what?

A. On a capital of \$2,845,000.

Q. Do you consider that a good business accomplishment?

A. Well, our earnings are one of the best in the State of New York and one of the best in the country, yes.

Q. That is in comparison with all other banks in Nassau County?

A. That is correct.

[fol. 660] Q. This exhibit that the family lobby has from

time to time for the inspection of customers and others, as you told us, is kept in the rear of the family lobby, isn't that correct?

A. No, that is not correct, because it is in the front windows, it is in the middle of the bank, and it is towards the rear. It doesn't go back any further, as a matter of fact, than three-quarters of the length of the family lobby from the front.

Q. Are there any shelves there in the front?

A. No, we have no shelves.

Q. When you walk into the lobby in building No. 2, as designated on Plaintiff's Exhibit No. 18—did you see that picture that I refer to as Plaintiff's Exhibit 18?

A. Yes.

Q. Are there any exhibits in that lobby?

A. We have exhibits in that lobby all the time.

Q. I am not talking about the rear; in the front as you walk in from the door. I will show you the pictures.

The Court: He can understand it.

A. It is possible that on the particular date that the picture was taken there were no exhibits there, just as you will find in a department store that there may not be any exhibits in the window in a department store because they are in the process of changing them.

The Court: The question really is: Do you have space for exhibits?

The Witness: Yes, we do.

The Court: And is it your practice to put exhibits there? [fol. 661] The Witness: And they are there almost all the time.

Q. You remember I was there September 18, 1950, at the bank where I examined you?

A. That's right.

Q. Will you swear that there were any exhibits in the window on that day in the lobby, that is, in the window in building No. 2 or the family lobby, as you call it?

A. The photographs which you have on exhibit would indicate that, because I believe you took a picture of those front windows, and it may be—

The Court: You would not know any particular date, would you?

The Witness: Yes, he is asking a particular date.

The Court: I say you would not know on any particular date.

The Witness: No, I wouldn't.

The Court: Whether there were exhibits in the windows. He has made the statement that as a general proposition and practice they are there.

Q. You would not say that the so-called exhibit of commodities was placed on the floor in the lobby leading from the street to the savings department, would you, with any regularity, I mean?

A. The lobby from the street to the savings department?

Q. That is right, to the front of the building.

A. The area from the entrance to the savings department is all lobby and it is only that portion of [fol. 662] the bank that is within about five feet of the front windows of the bank that are used for exhibit purposes.

Q. That is to attract people to it, isn't that right?

A. That is in the front windows of the bank, that's right.

Q. That is, a means of attracting would-be customers to create interest, isn't that right?

A. That is our reason or one of the main reasons for the exhibits.

Q. The only reason you say this place looks like or is intended to be a department store is that it has windows for display purposes, the front of it?

A. No, that is not correct. The windows are perhaps the least.

Q. Are there any shelves inside?

A. We have department store counters inside.

Q. I am going to ask you to show me, looking at these various photographs, where those counters are in the building on—what is that, Hempstead Turnpike?

A. That is right.

The Court: There was an exhibit here just a little while ago that shows this. Maybe you and the witness can come to an understanding as to what you mean by counters. You

do not deny that there were counters in the lobby, do you?

Mr. Rollins: What counters? Where the customers write, naturally.

Q. When I mentioned counters, I meant display counters like you find in department stores.

A. I know what you have reference to.

Q. You know what I meant. I will let you look at Plaintiff's Exhibit 28. That is a picture of the front [fol. 663] part of the family lobby, is it not?

A. Yes, it is.

Q. Are there any display counters there?

A. No, there are no display counters shown in here, but as I mentioned before, most of the time we have displays in this front section of the window.

The Court: And you use counters when necessary?

The Witness: Oh, and we have counters on the floor with displays in them all the time, and some of these pictures should show those counters.

Q. I show you Plaintiff's Exhibit No. 26 and ask you if you see any display counters there.

A. Yes, I see display counters there.

Q. Where are they?

A. I see one display counter right there, and I see part of a display counter here (indicating). You see the glass in the front, the glass on the top.

The Court: He points to these (indicating). Is that what you mean by display counters? Are you and he talking about the same thing?

Q. You mean when you say display counters that it has advertisement in front, is that right?

A. It has advertising in them and it also has products in them. Some of the services the bank sells—

Q. You mean in that picture, Plaintiff's Exhibit No. 26?

A. In this picture all that you see here are two large posters in the display counters, but usually at least three—[fol. 664] quarters of our display counters have products in them, and this only shows, as I mentioned, two of the counters of the perhaps twelve or fourteen display cases that we have in the bank.

The Court: Let us agree on this, anyhow.

Mr. Rollins: Judge, I do not think we ought to pursue it, inasmuch as your Honor said he was going to go down to the store itself.

The Court: That is right.

Mr. Rollins: Your Honor will understand what I mean.

Q. Did you intend to convey to this Court that when you built lobby No. 2 you did not want it to look like a bank although you were going to use it for banking purposes?

A. Most definitely, and those were the instructions given to the architect, and for years before that whenever I went with my wife shopping in department stores she used to get annoyed that I would gaze at the counters and the method of displaying goods, and I was thinking about banking instead of what she wanted to buy.

Q. If you looked at just merely Plaintiff's Exhibit No. 3, would you say that what you see there looks like a department store or a bank?

A. This particular counter in the front of the picture is a department store display counter that we use for——

Q. Does that look like a bank or does it look like a department store?

A. Well, it's hard to tell from just a small portion of the banking floor what it looks like. I know what it is.

[fol. 665] Q. You mean if a person would walk into, let us say, that portion of the premises shown on Plaintiff's Exhibit 26 he would believe he was in a department store, or would he feel that he is in a bank?

A. Well, I have stood outside the window of the bank on many occasions——

Q. I am talking about——

A. I am answering you.

Q. ——right there, looking at Exhibit 26.

The Court: Put it in the form of the impersonal. You said if a person walked in. Now he is trying to put himself in the place of that company.

Mr. Rollins: All right, let him answer the best way he can.

The Court: Yes, that is the way to answer it.

A. I have stood on the sidewalk outside of the bank on many occasions and I have seen people looking in the

window and I have heard them say, "This isn't a bank, is it? This is a department store. What are they selling here? Do they sell merchandise or what?"

Q. They never form a different opinion by anything they see in there; is that what you try to convey to this Court?

A. I don't mean to say that at all. People have generally got to know that it is a bank now.

The Court: I do not think you ought to pursue that subject. I think you have the record fully covered on that aspect. It is only a matter of discussion.

[fol. 666] Q. In the year 1948 were you instrumental in preparing this annual report of the defendant bank?

A. Yes, I was.

Q. I am referring now to Plaintiff's Exhibit No. 11.

A. I was.

Q. Did you read the contents of Plaintiff's Exhibit 11 before distributing it to the public?

A. I did.

Q. I call your attention particularly to page 11 of Plaintiff's Exhibit No. 11, under the heading of "Savings," wherein it was noted: "We had 12,096 thrift accounts at the end of 1944 totaling \$7,423,000. These figures this past year end were 19,561 accounts and \$13,961,000." Do you notice that statement therein?

A. Yes.

Q. When you mentioned the word "thrift accounts" therein what did you have reference to?

A. I had reference to savings accounts, but the Banking Department had been bothering us on many occasions about the use of the word "savings" and on occasion we changed it to thrift.

Q. That was in the year 1948, is that right?

A. Yes, I remember that year in particular.

Q. At that time you had 19,561 accounts, is that right?

A. That is correct.

Q. As stated there. That is these so-called thrift accounts, is that right?

A. In other words, savings accounts.

Q. That is passbook accounts?

A. That is correct.

The Court: You are in agreement on that.

Mr. Rollins: The only reason I mention the figures is keeping in mind all the time the so-called statement by the [fol. 667] pollsters that people generally did not know what it meant.

The Court: All right.

Mr. Rollins: No further questions.

Re-direct examination.

By Mr. Grimes:

Q. As of the time you spoke of time deposits in the National City Bank, what were their demand deposits?

A. Well, the total resources in the National City Bank are slightly over five billion dollars, and that would mean that their demand deposits therefore should be over four billion dollars.

Q. The ratio would be approximately ten to one, like other New York City banks, is that correct?

A. That is correct.

Q. Would you state what the figures would be by ratio or otherwise for Manufacturers Trust Company as of the time you spoke?

A. I would say it is approximately the same ratio of ten to one.

Q. When you gave figures for time deposits, were you including—or, rather, let me put it this way: When you gave figures for National City Bank and Manufacturers Trust Company for time deposits, were those figures for time deposits in the true sense of the term “time deposits”?

A. You mean when I gave figures as to the average account in those two banks. As I recall it now, we divided the 400 million dollars figure by approximately \$1,000 per account.

Q. And arrived at 400—

A. And arrived at 400,000. We should not have done that because a high percentage of those 400 million dollars [fol. 668] worth of deposits constituted deposits other than passbook accounts.

Q. Have you any notion as to what the passbook accounts of Manufacturers Trust Company were?

A. No, I do not know that.

Q. Or of National City?

A. No, I do not know that.

Q. In other words, you do not have a breakdown?

A. I don't have a breakdown on that.

Q. Do you know whether the time deposits, excluding passbook accounts, are generally larger in New York City banks than passbook accounts deposits?

A. Yes, generally they are larger.

Q. You testified that savings banks pay 2 per cent interest?

A. Yes.

Q. How long have they been doing so?

A. They have been doing so for about two years.

Q. Will you state, please, for the past two years what national banks have generally paid on their savings deposits?

A. Approximately 1 per cent.

Q. What has the defendant bank paid on savings deposits in the past two years?

A. We changed our rate to 2 per cent on the 1st of January of this year. Prior to that time and for a period of four years or so we were paying 2 per cent on the first \$1,000 of deposit, excluding the first \$100, and 1½ per cent on all deposits over \$1,000.

Q. Other banks, you testified, are now paying about 1½ per cent. Is that increase in the amount paid recent?

A. Generally, commercial banks are increasing their rates on savings deposits. I can't say that the average rate has now gotten up to 1½ per cent, but there are a number of banks paying 1½.

[fol. 669] Q. Is it your opinion that such increases as there have been have been caused by competition?

A. Yes, that is one of the main reasons for the increases: competition.

Q. Is that competition with savings banks or with savings and loan associations, or with both?

A. With both institutions, and in Nassau County particularly with savings and loan institutions.

Q. Now I show you Defendant's Exhibits Nos. X and W for identification and ask if you know what those are.

A. Yes, I do.

Q. Do you know those to be official documents?

A. Yes, I do.

Mr. Grimes: I am going to offer those in evidence, your Honor.

Mr. Rollins: That is objected to. May I call your Honor's attention to Section 344-a of the Civil Practice Act: If there is a rule and regulation of a Federal agency——

The Court: Wait a minute. I am sustaining the objection. You don't have to say anything.

Mr. Grimes: You have sustained it, sir?

The Court: Yes.

Mr. Grimes: We ask the Court to take judicial notice of those rules and regulations under Section 344-a. Would you like to have them for your convenience?

The Court: I would think that if they are properly promulgated rules and regulations of which I am to take judicial notice, you can use them in this case with your memorandum.

[fol. 670] Mr. Rollins: May I say to your Honor that I do not think these offered regulations have been filed with the Federal Register as is required under the State law.

The Court: Wait. You don't have to say that. That is the reason I am sustaining the objection. I will say this much: We will leave it this way, and I know you will cooperate to this extent: With an objection as to their competency, I cannot receive them in evidence, but after today if you are able to make them competent by talking to Mr. Rollins and getting any other proof that you want, you can still put them in evidence.

Mr. Grimes: Thank you, sir.

The Court: It is only a matter of form. But with the objection I must exclude them.

Mr. Rollins: Will counsel say that they are in the Federal Register?

The Court: Suppose you discuss that later.

Mr. Rollins: I spoke to Mr. Friedman the other day and gave him the Court of Appeals case.

The Court: No, I don't say that. I say when you leave here today talk about those over the telephone and if you come to an understanding, send them out here and I will make them part of the record.

Q. Have you relied upon the use of the words and definitions of savings deposits in Defendant's Exhibits X and W for identification in using the words "savings" in connection with the operation of your bank?

[fol. 671] Mr. Rollins: That is objected to, if the Court please. An opinion must be based upon matters in evidence.

The Court: The word "rely" is stronger than it should be. The question may be asked, Did you ever see those and did you read therein the word "savings" used in connection with the bank?

Mr. Grimes: Very well, I ask that question.

The Witness: Yes.

Mr. Rollins: I move the answer be stricken out.

The Court: No, I will allow him to say that.

Mr. Rollins: Your honor denies my motion, sir?

The Court: Yes, I deny the motion to strike out.

Mr. Rollins: Exception. Because in reading from something not in evidence——

The Court: Counsel is not reading.

Mr. Rollins: Relying upon something not in evidence.

The Court: The witness saw it, that is all. All right, I do not think that is too important.

Mr. Grimes: The defense rests.

(Witness excused.)

The Court: Both sides rest.

Mr. Grimes: We now renew the motion previously made and move for judgment.

The Court: You make the same motion, Mr. Rollins?

Mr. Rollins: No. I move now, for the purpose of the record, to strike from the record——

The Court: Wait. I do not want to take those motions at this time. I will take the motion moving for judgment. I would like you to take plenty of time.

[fol. 672] Mr. Rollins: Judge, I will have to have it on the record.

The Court: That will be on the record. I shall have it added to the record. You have tried a long case, a complicated case, a difficult case, and I want you to have the fullest opportunity to present your motions, and I will say the same to both sides. If you want to make your motions in

writing, send them to me and I will add them to the record. I shall reserve decision on all motions.

Mr. Grimes: We have made ours, sir.

The Court: All right. But Mr. Rollins has a little more difficult motion to make than just motion for judgment. So, send me and send Mr. Grimes a copy of your motion, in letter form, if you wish, and it will be added to the record just as if you made it today.

Now, gentlemen, is there any desire upon your part to submit anything further to the Court, or have you submitted everything you want to submit by way of memorandum?

Mr. Grimes: I think that is largely at your Honor's pleasure. I take it you do not care to hear argument?

The Court: Not at this time. If I do, I shall notify both counsel. Suppose I say that you may have all next week to submit a brief to the Court, if you so desire, in addition to what has already been submitted.

Mr. Grimes: If your Honor would care to have any points briefed, we would be very happy to do so.

The Court: No, I don't care to. You do not need to exchange those briefs. Those are trial memoranda. Just submit them, that is all.

[fol. 673] Mr. Grimes: If you wish to have submission of oral argument, we would be very happy to do so.

The Court: If I find I would like oral argument, I shall be willing to impose upon you and ask that you come out and give me the benefit of your enlightenment.

Gentlemen, I would like to compliment you on presenting a very difficult case and an important case.

Mr. Grimes: Thank you. I wish to thank the Court for the great patience that has been shown to both sides.

Mr. Rollins: Those are my sentiments, too.

IN SUPREME COURT OF THE STATE OF NEW YORK, NASSAU
COUNTY

MOTION BY PLAINTIFF TO STRIKE OUT EVIDENCE AND FOR
JUDGMENT IN FAVOR OF PLAINTIFF—February 15, 1951

Re: The People of the State of
New York v. The Franklin
National Bank of Franklin Square.

Hon. Thomas J. Cuff,
Justice of the Supreme Court
of the State of New York,

Nassau County,
Old Country Road,
Mineola, Long Island, N. Y.

HONORABLE SIR:

At the conclusion of the trial of the above entitled action on February 2, 1951 when I was about to make motions with [fol. 674] respect to the evidence adduced by the defendant and for judgment in favor of the plaintiffs, with my reasons based upon the trial record and the law applicable thereto, you directed that in lieu thereof I make the same in writing in letter form. Accordingly, I herewith submit for your consideration and determination certain motions of the plaintiffs hereinafter stated to be incorporated in the stenographic trial record in said action with the same force and effect as if made orally at the conclusion of said trial, viz:

I. The plaintiffs request that the trial court take judicial notice of the fact that commercial banks in the State of New York inclusive of National Banks who operate a time deposit or pass book account department paying interest on time deposits or pass book accounts have employed in their business and in advertising media soliciting such accounts, trade terms describing same as "Thrift Account" or "Compound Interest Account" or "Special Interest Account". That such terms have become generally and commonly understood by the public as meaning interest bearing deposits of money in commercial banks and the

withdrawal therefrom by the depositor from such account by means of a pass book.

II. The plaintiffs move to strike from the record the testimony of Professor Matthew N. Chappell, Willard R. Simmons, Ohnmacht, Richard Brumbach, William J. Boyle, Hope Butt, Hilda Barnes and of the other persons associated in the so-called "Hofstra Survey" and all of the defendant's exhibits in evidence documentary thereof [fol. 675] dealing therewith and the opinions of all or any of them oral or written intending by the defendant to show extent of public's knowledge of certain terms used by financial institutions, i. e., (a) "Savings Account", (b) "Compound Interest Account", (c) "Special Interest Account" and (d) "Thrift Account" because:

A. The matters embraced in such survey are matters of common knowledge and therefore not subject to expert opinion evidence.

B. That said witnesses so engaged in making the said "Hofstra Survey" were not licensed detectives or deputized as such, and in violation of Article 7 of the General Business Law had gathered the said evidence embraced in such "Hofstra Survey" intended to be presented in a civil trial for a reward or compensation received by them.

C. That said evidence violated the hearsay rule.

D. That the opinions expressed orally by Professor Chappell, Willard R. Simmons, Richard Brumbach, and by the alleged supporting documentary evidence, notably defendant's exhibit CC that the meaning of the terms (a) "Thrift Account", (b) "Compound Interest Account", and (c) "Special Interest Account" were not known by a majority of the inhabitants of Nassau County, were not based upon personal knowledge of the witnesses and such opinions were received and expressed by them without a hypothetical [fol. 676] question being given them which included the assumption of the truthfulness of the facts in evidence. Moreover, the Court permitted such opinion to be expressed and to be presented by supplemental documentary evidence on matters totally derived through hearsay.

E. That it affirmatively appeared from the admission made by Richard Brumbach upon cross examination that

the ages of the respondents involved in said "Hofstra Survey" were not factual, but arrived at by pure estimate and speculation on the part of the interviewer so that the basic requirement of the survey that each respondent to be interviewed must be at least 21 years of age is lacking, thus rendering the survey valueless.

F. It affirmatively appeared from the admission of Richard Brumbach, as associate Professor and collaborator of Professor Chappell, upon cross examination that if all or a majority of the 928 persons involved were ineligible to open a time deposit account because they had no job, income or property, the "Hofstra Survey" could not accomplish the purpose intended and that the conclusions thereof were erroneous. There is no evidence in the trial record and there is no presumption in law that any or all of those 928 persons interviewed and who formed the basis of the "Hofstra Survey" were eligible to open a time deposit account.

G. That the "Hofstra Survey" and its conclusions are refuted by other evidence adduced, namely the [fol. 677] testimony of Mr. Roth, the defendant's President, who on cross examination testified that commercial banks in Nassau County, out of a population of approximately 666,000 inhabitants inclusive of infant children had depositors approximating 125,000 in number, who had time deposit or pass book accounts in such commercial banks. A fortiori, it is of no legal significance nor materiality to the issues in this action whether the public knew or did not know the meaning of the terms (a) "Thrift Account", (b) "Compound Interest Account" and (c) "Special Interest Account" for the same could not by any process of reasoning sustain the defendant's contention that such lack of knowledge constituted in the light of Section 258, subdivision 1 of the New York State Banking Law an interference by the State of New York with the purpose of a National Bank's creation and tends to impair or destroy its efficiency as a federal agency. The fact that the defendant itself enjoyed 30,000 time deposit or pass book accounts out of the total number of 125,000 similar accounts in the commercial banks doing business in Nassau County makes such contention on the part of the defendant ludi-

crous. In the final analysis, the question is posed what difference does it make whether the public knows the meaning of the three terms, namely (a) "Thrift Account", (b) "Compound Interest Account" and (c) "Special Interest Account" so long as commercial banks received the benefits of time deposits or pass book accounts in such large numbers.

[fol. 678] H. Even if we assume, as the defendant contends that a lack of knowledge of a majority of the public as to the meaning of the three terms, (a) "Thrift Account", (b) "Compound Interest Account" and (c) "Special Interest Account" tends to place it at a disadvantage in competing with savings banks and savings and loan associations who are permitted to use the trade terms "saving" or "savings" which we deny for reasons aforesaid, the "Hofstra Survey" and its findings on the subject merely covers a condition in Nassau County and not in the other 61 counties of the State. In view of the fact that Section 258, subdivision 1 of the New York State Banking Law is not local and restricted to Nassau County, but rather to all of the 62 counties of the State, it is obvious that the "Hofstra Survey" can hardly be considered probative as to the public's knowledge of the subject throughout the State. In this connection, it must be borne in mind that the experts who planned and executed the "Hofstra Survey" admitted that their findings were restricted to Nassau County only, and does not reflect the knowledge of the public elsewhere in the State. Moreover, the irrefuted testimony given by Mr. Ludemann, the Deputy Superintendent of Banks of the State of New York established that outside of the City of New York, pass book accounts in commercial banks approximates \$1,100,000,000. In view of the testimony of Mr. Roth, defendant's President that the average pass book account is \$1,000, the time deposits of \$1,100,000,000 represents 1,100,000 pass book accounts.

[fol. 679] It should be noted here too that the uncontradicted testimony of Mr. Ludemann established also that commercial banks doing business outside of New York City made special effort to obtain pass book accounts and that by reason thereof were successful in obtaining a ratio between their demand deposits and time deposits of 3 to 1 in

favor of demand deposits and whereas New York City commercial banks and those in Nassau County did not make a comparable effort, the ratio between demand deposits and time deposits were 14 to 1 in favor of demand deposits. In any event, all of this evidence supplemented by the facts revealed in the statistical report and contained in Defendant's Exhibit NN shows that commercial banks throughout the State inclusive of National Banks have pass book accounts numbering in the millions and in the billions of dollars in the aggregate. In view of the statistical facts, the claim and contention of the defendant that Section 258, subdivision 1 of the New York State Banking Law tends to interfere with the purpose of defendant's creation as a National Bank and to impair or destroy its efficiency as a federal agency is untenable.

The defendant's counsel have cited cases and text book authority in its brief submitted to the Court which they claim sustain their contention that the "Hofstra Survey" is admissible in evidence as an exception to the hearsay rule. However, an examination by the Court of the mentioned citations, will convincingly establish that same have no application to the facts and circumstances of this case. [fol. 680] None of the authorities cited by the defendant's counsel expresses an Appellate Court's Opinion holding that sample surveys of public opinion or knowledge on any subject are competent evidence in a civil or criminal trial as an exception to the hearsay rule. The only cases where such evidence was ever received appears to be restricted to cases involving unfair competition where goods of one are palmed off as those of another. Even in those cases, the Courts have held such testimony to be unreliable.

In *Oneida Ltd. v. National Silver Co.*, 25 N. Y. Supp. (2d) 271, decided by the Special Term of the Supreme Court, Madison County cited by defendant's counsel in their brief at pp. 2 to 4 inclusive to support their contention that the so-called "Hofstra Survey" was admissible in evidence omitted to include this significant observation of the Court at page 286 of the Opinion in the case, viz.,

"The weight and sufficiency of this evidence (plaintiffs public opinion survey) is another question. * * *

The defendant, reserving its right under its objection, made a similar survey * * *. The results of both surveys were, in my opinion, inconclusive; and I do not attach weight to this part of the evidence."

The opinion of the Court in that case does not support the contention of the defendant's counsel that the Court in the cited case held that the survey was competent but did not attach any weight thereto "only because of error in the [fol. 681] method used—a factor which the Hofstra Survey in the present case has eliminated."

Also in the case of *Dupont Cellophane Co. Inc. v. Waxed Products Co. Inc.*, 85 Fed. (2d) 75 cited by defendant's counsel, there is no statement by the Circuit Court of Appeals as claimed by them that the results of a survey of public opinion is competent evidence. We cannot infer such ruling as an inference from the text of the Court's opinion. Other than the Court's conclusion at page 80 that "*such proofs have no great weight*" nothing else appears. This statement by the Court, I submit does not lend itself to an interpretation that such evidence is competent as an exception to the hearsay rule.

Further, in the case of *Metropolitan Opera Ass'n v. Pilot Radio Corp.*, 189 Misc. Rep. 505 cited by the defendant's counsel, Judge Shientag sitting at Special Term for motions did not have the occasion to pass upon the competency of a survey of public opinion as a matter of evidence, since the issues before him was not as a trial court, but rather on a motion for a temporary injunction to prevent unlawful competition. The moving papers did however show by a shopping survey of 25 retail stores that in 70% of the sales of music recordings made and distributed by the defendant under an advertisement "featuring the Metropolitan Symphony Orchestra" tended to confuse the public that the recordings were made by the plaintiff, the Metropolitan Opera Ass'n. In addition to other facts submitted to the Court the survey merely tended to cumulatively indicate that the plaintiff had a meritorious cause of action [fol. 682] warranting the granting of a temporary injunction. The Court obviously did not have need to pass upon the competency of this evidence.

However, the other authorities cited by defendant's counsel to support their contention that the "Hofstra Survey" is admissible in evidence as an exception to the hearsay rule are not in point and have no application to the facts and circumstances in this case. Any further discussion thereon would tend to belabor the obvious.

III. The plaintiffs move for judgment enjoining the acts complained of.

The uncontradicted evidence presented by the plaintiffs upon the trial of the action shows a clear violation by the defendant of the provisions of Section 258, subdivision 1 of the New York State Banking Law. This statute obviously is the exercise by the State of New York of its police power. The police power under the American Constitutional System has been left to the States (*Keller v. United States*, 213 U. S. 138; *Patterson v. Kentucky*, 97 U. S. 501). It has always belonged to them and was not surrendered by them to the general government or directly restricted by the Constitution of the United States (*Hammer v. Dagenhart*, 247 U. S. 251; *House v. Mayes*, 219 U. S. 270). It has repeatedly been held that no provisions of the federal constitution and none of the amendments added to that instrument were intended or designed to interfere with the police power of the various States (*Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. [fol. 683] Co.*, 111 U. S. 746; *Holden v. Hardy*, 169 U. S. 366).

Each State has the power therefore to regulate the relative rights and duties of all persons, individuals and corporations within its jurisdiction for the public convenience and the public good (*State ex rel. Smith v. Fidelity & D. Co.*, 191 N. C. 643, 132 S. E. 792 [writ of error dismissed in 275 U. S. 505]). The only limit to State exercise of power in the enactment of police laws is that they shall not prove repugnant to the provisions of the State or National Constitution.

See also 11 American Jurisprudence on Constitutional Law § 255, pp. 986, 987.

The police power of the State is not limited to regulations necessary for the preservation of good order or the public health and safety. The prevention of fraud and deceit and cheating and imposition is equally within the power (*Mer-*

chants Exch. v. Missouri, 248 U. S. 365; *Hall v. Geiger-Jones Co.*, 242 U. S. 539). Therefore, a State may prescribe all such regulations as, in its judgment, will secure or tend to secure the people against the consequences of fraud (*Hawker v. New York*, 170 U. S. 189; *People v. Guiton*, 210 N. Y. 1; *People v. Luhrs*, 195 N. Y. 377, 25 L. R. A. [N. S.] 473) and may institute any reasonable preventive remedy required by the frequency of fraud, or the difficulty experienced by individuals circumventing it, especially when other means have not proved efficacious (*State v. De Verges*, 153 La. 349, 95 So. 805, 27 A. L. R. 1526; *People v. Dehn*, 190 Mich. 122, 155 N. W. 744, citing R. C. L.; *People v. Wag-* [fol. 684] *ner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, 24 Am. St. Rep. 141).

See also 11 American Jurisprudence on Constitutional Law § 273, p. 1027.

In accordance with the settled principle that no part of the federal constitution was intended to hamper a valid exercise of State police regulation as above stated, it is particularly established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with (*Louisville & N. R. Co. v. Melton*, 218 U. S. 36; *Keller v. United States*, 213 U. S. 138; *Giozza v. Tiernan*, 148 U. S. 657), and does not interfere with (*Nebbia v. New York*, 291 U. S. 502; *Lacoste v. Department of Conservation*, 263 U. S. 545), curtail (*Re Rahrer* [*Wilkerson v. Rahrer*], 140 U. S. 545), restrain (*Pacific Gas & E. Co. v. Police Ct.*, 251 U. S. 22), destroy (*Cunnius v. Reading School Dist.*, 198 U. S. 458), or take from the States (*Terrace v. Thompson*, 263 U. S. 197) the right duly and properly to exercise the police power. Furthermore, this amendment does not limit the subjects upon which the police power of a State may be exerted (*Cunnius v. Reading School Dist.*, 198 U. S. 458; *Brim v. Jones*, 165 U. S. 180).

In discussing the relationship between the guarantees of the Fourteenth Amendment and the police power of the States, Justice Holmes in *Noble State Bank v. Haskell*, 219 U. S. 104, 110, has pointed out with equal application to the facts and circumstances in the case at bar:

“* * * we must be cautious about pressing the broad words of the Fourteenth Amendment to a

[fol. 685] drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, *judges should be slow to read into the latter a nolumus mutare as against the law-making power.*" (Emphasis supplied.)

See also 11 American Jurisprudence on Constitutional Law § 261, pp. 995, 997.

Determinative of the issues in this case is the universal rule of application promulgated by the United States Supreme Court, namely that it should never be held that Congress intends to supersede or by its legislation, suspend the exercise of the police powers of the States, even when it may do so, unless the purpose to effect the result is clearly manifested (*Reid v. Colorado*, 187 U. S. 137, 148; *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766).

See also 11 American Jurisprudence on Constitutional Law § 255, p. 988.

In *Reid v. Colorado*, 137, 148, the United States Supreme Court in repudiating the contention made by the defendant in the case at bar that the National Banking [fol. 686] Act (12 U. S. C. A. § 371) should be construed by implication so as to supersede or suspend the exercise of the police powers of New York by the enactment of Section 258, subdivision 1 of the New York State Banking Law, pertinently stated:

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case

where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.' *Sinnot v. Davenport*, 22 How. 277, 243."

Again in *Matter of Coronet Hotel Corp. v. Coster*, 196 Misc. Rep. 610, 612, the Court made this significant observation:

"All parties to this controversy recognize the well-established principle that when Congress has acted with intent to pre-empt the field of regulation in a matter over which Congress has authority to rule, State and local laws must yield to the Federal statute (*Southern Ry. Co. v. Railroad Comm. of Indiana*, [fol. 687] 236 U. S. 439; *Pennsylvania R. R. Co. v. Public Service Comm.*, 250 U. S. 566).

Before this principle of the supremacy of an act of Congress can be applied, however, the 'repugnance or conflict should be direct and positive, so that the two acts [can] not be reconciled or consistently stand together'. (*Sinnot v. Davenport*, 22 How. [U. S.] 227, 243; *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 623; *Reconstruction Finance Corp. v. Central Republic Trust Co.*, 17 F. Supp. 263, *affd. sub nom. Reconstruction Finance Corp. v. McCormick*, 102 F. 2d 305, *certiorari denied* 308 U. S. 558.)

It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, 'unless its purpose to effect that result is clearly manifested.' (*Reid v. Colorado*, 187 U. S. 137, 148.)

This necessity for a clear manifestation of Congressional intent to prevent the States from exercising their police powers has been repeatedly emphasized (*Missouri, K. & T. Ry. Co. v. Harris*, 234 U. S. 412; *Allen-Bradley Local v. Wisconsin Employment Relations Bd.*, 315 U. S. 740, 749; *Matter of Davega-City Radio v. State Labor Relations Bd.*, 281 N. Y. 13). *Such intent is not to be inferred from the mere fact that Congress has seen fit to circumscribe its legislation and to oc-*

copy a limited field (*Savage v. Jones*, 225 U. S. 501, [fol. 688] 533). Even if the Federal Government has legislated in a particular field, local regulation in that field is not necessarily prohibited unless national uniformity is essential. The State or municipal statute will be stricken only if—in terms or in practical administration—it conflicts with the Federal law or infringes on its policy (*Hill Packing Co. v. City of New York*, 295 N. Y. 527; *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U. S. 761, 766).” (Emphasis supplied.)

It is obvious that the National Banking Act (12 U. S. C. A. § 371), does not clearly manifest an intention of Congress to supersede the regulatory provisions of Section 258, subdivision 1 of the New York State Banking Law. Moreover, the New York Statute is not repugnant or in conflict with the provisions of 12 U. S. C. A. § 371 because of the following considerations. It should be borne in mind that the general term of the Supreme Court in *People v. Binghamton Trust Company*, 20 N. Y. Supp. 179, 183, affd. 139 N. Y. 185, 190 expressed the opinion that the New York State statute did not intend to confer upon savings banks a monopoly of the class of business usually transacted by them, but rather to protect the public against deception or imposition by prohibiting the receiving and soliciting deposits by any person, firm, corporation or association, under the claim or pretense of being a savings bank. The general term opined that “the manifest purpose of the section [fol. 689] (Banking Law § 258) was to render it unlawful to advertise, put forth a sign, solicit or receive deposits claiming or pretending to be a savings bank.” The Court of Appeals in affirming the general term in words and substance held the same view as its reported Opinion indicates.

It is apparent therefore that the statute claimed by the defendant to be constitutionally invalid does not prohibit any commercial bank inclusive of the defendant, a national bank, to receive time deposits and to pay interest thereon as a natural incident of all banking business. On the other hand, the National Banking Act. (12 U. S. C. A. § 371) authorizing national banks “to receive time and savings de-

posits and to pay interest on the same," does not expressly authorize national banks to solicit or receive deposits by word, such as "savings," act or deed claiming, representing or pretending to be a savings bank, nor can such intention be implied from the statute itself for reasons aforesated and as hereinafter amplified. Hence, both the State statute and the National Banking Act are reconcilable and not conflicting in their provisions.

The attention of the Court is directed to the fact that the defendant does not contend that the use by commercial banks inclusive of national banks in the State of New York of the prohibited terms "saving" or "savings" or their equivalent in advertising media soliciting time deposit or pass book accounts in connection with their business is indispensable thereto. However, the effect of the expert testimony [fol. 690] by Messrs. Evans and Abel and others, officers of national banks that the prohibition of the State statute is a hardship upon national banks generally, is merely conclusory without any facts in evidence to sustain such speculative opinion. Moreover, in the face of the statistical facts in evidence establishing that commercial banks inclusive of national banks enjoy millions of time deposit or pass book accounts totalling billions of dollars in the aggregate, the opinion so expressed by the officers of the national banks called as witnesses by the defendant, and who undoubtedly were motivated by self-interest is valueless. Also, the fact that commercial banks and national banks have annually within the last ten years increased their volume of time or saving deposit accounts in such large numbers and amount above stated, renders the contention by the defendant that the prohibition of the State's statute tends to impair or destroy defendant's efficiency as a federal agency untenable.

Very significant here is the consideration that the defendant as one out of 46 commercial banks doing business in Nassau County has 30,000 time deposit or pass book accounts out of a total of 125,000 such accounts held by it and the others, and that the defendant during the year 1950 had set up three additional branches in Nassau County because these factual features show prosperity not frustration nor impairment of efficiency.

In addition, People's Exhibit No. 36 in evidence, which represents defendant's financial prosperous condition as of December 31, 1950, and also the defendant's expanded [fol. 691] growth and business through the years as indicated therein stamps as specious defendant's argument that the State Banking Law tends to impair or destroy the efficiency of national banks, which are in the final analysis commercial banks.

I wish to mention here too that the Presidents of national banks who testified as expert witnesses for the defendant, despite their claim that their banks, national banks and commercial banks generally considered the prohibition of the State Banking Law (§258) a hardship because they were compelled to use such trade terms as "Thrift Account", "Special Interest Account" or "Compound Interest Account" were forced to admit on cross examination that their institutions during the last five years had increased their time deposit or pass book accounts in numbers and the amount in dollars of such deposits, and were enjoying greater prosperity each year by reason thereof, as did the other national banks and commercial banks throughout the State.

Aside from the fact that Section 258 of the Banking Law of the State of New York as an exercise of police power was not superseded by the National Banking Act, Federal Reserve Act or any other paramount federal statute because there was no clear manifest expression of Congress to that effect under the authorities above mentioned, the Federal Reserve Act (12 U. S. C. A. §371) upon a careful examination thereof does not lend itself to a construction so as to authorize the defendant, as a national bank by implication to advertise for time deposits or pass book accounts by the use of the prohibited term [fol. 692] "savings" because of these observations. National banks are commercial banks as distinguished from savings banks and are regarded to be engaged in different classes of banking (see Argument in Points II and III of main brief; 12 American Jurisprudence on Constitutional Law, §506, pp. 187 and 188). Independent of statute, all classifications of banks inclusive of national banks and savings banks have the right as an incidental and necessary power to receive deposits and to pay interest thereon

(*People v. Binghamton Trust Company*, 20 N. Y. Supp. 179, 183 aff'd 139 N. Y. 185; authorities cited at p. 13 of main brief). If that be so, one may ask then why was it necessary for Congress to amend the Federal Reserve Act (12 U. S. C. A. §371) to empower national banks

“* * * continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such associations may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located?”

The simple answer is that for some time prior to the amendment above quoted, many people questioned the authority of national banks to receive time deposits or pass book accounts, and to pay interest thereon because the powers of national banks enumerated in 12 U. S. C. A. [fol. 693] §24 did not expressly authorize the same. However, national banks did have such power as a natural incident of banking and by express provision of the National Banking Act recognizing the same, so that the amendment of the Federal Reserve Act above quoted (12 U. S. C. A. §371) was unnecessary because the National Banking Act (12 U. S. C. A. §24) also provided:

“Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; * * *”

That Congress recognize that the right of national banks to receive time deposits or pass book accounts existed independent of statute, or that such right was implicit in the provisions of the Federal Reserve Act (12 U. S. C. A. §24) is clearly manifested by the wording of the amendment (12 U. S. C. A. §371) which significantly provides that national banks may “* * * continue here-

after as heretofore to receive time and savings deposits and to pay interest on same * * *

In construing the Federal Reserve Act, your Honor may consider the contemporaneous circumstances (*United States v. Anderson*, 76 U. S. 56; *Feitler v. United States*, 34 F. (2d) 30, cert. granted; *Danovitz v. United States*, 280 U. S. 548 aff'd 281 U. S. 389), the clause of the Federal [fol. 694] Reserve Act above quoted and the necessity for it, the object in view and the evil which it is intended to remedy should always be taken into consideration by the Court (*Stirling v. United States*, 48 Ct. Cl. 386).

Since the trial record in the case shows by the testimony of Mr. Ludemann, the New York Deputy Superintendent of Banks, the defendant's expert witnesses in the person of national banks presidents, inclusive of Mr. Roth, defendant's president that in the banking business the term "savings deposits" are included in the term "time deposits," the term "savings deposits" employed in the amendment to the Federal Reserve Act (12 U. S. C. A. §371) may be considered loose and unnecessary verbiage, for by such amendment Congress undoubtedly never intended to confer powers of a savings bank in the accepted sense, upon national banks. It would, therefore, appear that the term "savings deposits" in the amendment to the Federal Reserve Act following the term "time deposits" in the amendment must be considered as a colloquial expression intended to mean "pass book accounts."

The power of the Court, so to do, is under the rule of construction of statutes that when words occur in a statute which can be given no effect consistent with the plain intent of the statute, they must be rejected as without meaning (*United States v. Jackson*, 143 F. 783, 75 C. C. A. 41, reversing C. C. 1905 ex parte Jackson 140 F. 266). Words added to a statute as in the case at bar out of an obvious abundance of caution should not be given weight beyond [fol. 695] their purpose (in re *Bolster* 66 F. Supp. 566). A Court is not compelled to apply a clause in a statute literally or at all, if such application will result in applying the statute as a whole in a way completely contradictory of its paramount purpose (*Arkansas Oak Flooring Co. v.*

Louisiana & A. Ry. Co., 166 F. (2d) 98 cert. denied 334 U. S. 828).

For your Honor to construe the amendment to the Federal Reserve Act (12 U. S. C. A. §371) enacted August 23, 1935 under the Laws of United States, Chapter 614 §§ 208, 328, 49 Stat. 706, 717 in the aforementioned circumstances as a power by implication to the defendant as a national bank to solicit "pass book accounts" by the use of the prohibited term "savings" as the defendant contends would be placing a strained construction on the Federal Reserve Act and put a meaning thereon obviously never intended by Congress. Such construction if given by the Court in the case at bar would be tantamount to legislation by the judiciary and usurpation of the legislative prerogatives. An interpretation of statutes can not extend to amendment or legislation, nor can considerations of an apparent hardship justify a strained construction of the law as written (*Ladew v. Tennessee Copper Co.*, 179 F. 245, 252, aff'd 218 U. S. 357). A statute should be so construed as to effectuate its evident purposes (*Securities and Exchange Commission v. Associated Gas & Electric Co.*, 24 F. Supp. 899, aff'd 99 F. (2d) 795).

Moreover, the Federal Reserve Act (12 U. S. C. A. §461) referring to Section 371b thereof which deals with a regulation of the rate of interest on the time deposits [fol. 696] to be paid by national banks significantly defines the term "savings deposits" as "time deposits" intended to be included in the terminology of the latter. The pertinent provisions of such statute (12 U. S. C. A. § 461) reads as follows:

"* * * that, within the meaning of the provisions of this section and sections * * * 371b. * * * of this title regarding the reserves required of member banks, the term 'time deposits' shall include 'savings deposits'."

This statutory definition must prevail, regardless of what other meaning may be attributable to the terms of the statute by other authorities or even by common understanding (*Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F. (2d) 166 reversing 15 F. Supp. 938, reversed C. C. A. 107 F. (2d) 965. Set aside on rehearing 107 F. (2d) 965

cert. denied *Williams v. Emery Bird Thayer Dry Goods Co.*, 309 U. S. 655; *Cohtran & Co. Connaly v. U. S.* 276 F. 48 aff'd 283 F. 973). The fact that the term "savings deposits" by statutory definition of Congress is deemed to be included in the term "time deposits" lends weight to my contention that the term "savings deposits" is mere surplusage and must be construed as a colloquial expression to mean "pass book accounts" and was never intended to authorize the defendant as a national bank to use the term "saving" or "savings" or their equivalent in any advertising media in the solicitation of "time deposits" for its savings department. It should be noted here that the savings [fol. 697] department of a national bank is not a savings bank in the technical sense (*Hernandez v. First National Bank of Omaha*, 249 N. W. 592, 125 Neb. 199).

This contention finds support in the rule that all statutes in *pari materia* are to be read and considered together (*United States v. Colorado & N. W. R. Co.*, 157 F. 321, cert. denied 209 U. S. 544). Therefore, the Federal Reserve Act which was amended on August 23, 1935 containing provisions, among others, granting national banks the right to receive "time deposits or savings deposits" (12 U. S. C. A. § 371), regulated the rate of interest thereon (12 U. S. C. A. § 371b) and defined the term "time deposits" as indicating the term "savings deposits". All of these specified amendments were enacted by Congress at the same time. *A fortiori* they are to be read and considered together.

The fact that there was a difference of opinion on this very same subject between the United States Comptroller of Currency and the Banking Department of the State of New York since 1938 without Congressional clarification on the subject by appropriate amendment implementing the National Banking Act or the Federal Reserve Act at the insistence of the United States Comptroller of Currency reasonably supports my view that the Federal Reserve Act (12 U. S. C. A. § 371) is not a paramount statute superseding Section 258, subdivision 1 of the New York State Banking Law.

It has been claimed by the defendant in support of its contention that the denial by the State of its right to use

the term "savings" in the solicitation of "pass book accounts" [fol. 698] counts" for its business tends to reduce such business to a point where it could not comply with the requirement that it purchase United States securities inclusive of United States Savings Bonds. Of course, the trial record fails to support such contention. In any event, such contention is based upon mere speculation for apparent reasons. However, defendant claims that such situation tends to interfere with the purpose of its creation as a federal instrumentality. This contention is based upon a false premise for the reason that there is no compulsion in law for a national bank or any other type of bank to purchase United States Savings Bonds or other securities. Such matter is one of discretion with each particular bank, and as a matter of practice part of the investments by all classifications of banks inclusive of national banks are in the United States securities inclusive of United States Savings Bonds.

In this regard, all banks are on the same footing with the investing public. Even if we assume *arguendo* that the "time deposits" of the defendant and other banks generally would be diminished by the denial of the right to use the prohibited terms "saving" or "savings" or their equivalent and thereby reduce their ability to purchase sufficient United States Government securities, which I deny, this situation would not support the defendant's contention that Section 258, subdivision 1 of the New York State Banking Law tends to interfere with the purpose of its creation, because the National Banking System was devised solely to provide a national currency secured by [fol. 699] a pledge of United States Bonds, and national banks are agencies or instruments of the Government for that purpose exclusively (*Davis v. Elmira Savings Bank*, 161 U. S. 275). It thus appears that the national banks were not created as a means for the United States Government of financing its requirements by compulsion of law. This becomes all the more crystal clear when we recall that national banks are private enterprises for profit and gain and enures to the stockholders thereof.

To confuse the issues, the defendant has seen fit to contend that the State's statute had the effect of prohibiting

the defendant from putting up in its banking establishments posters and to include in its advertising media, the words "Buy United States Government Bonds". Such contention is untenable for the reason that Section 258, subdivision 1 of the New York Banking Law prohibiting national banks and commercial banks from the use of the term "saving" or "savings" or their equivalent expressly limits the use of the prohibited terms by the defendant "in its business". The sale of United States Government Bonds is not a part of the defendant's business and in effecting a sale for the Government, it acts as the Government's fiscal agent, for which this defendant as a national bank, like other State banks inclusive of savings banks, receives a few pennies for similar services to the United States Government on a voluntary basis. Moreover, there is nothing in the law which compels national banks or any State bank inclusive of savings banks to act as such fiscal agent for the sale of United States Savings [fol. 700] Bonds or other securities. This is however done by all classifications of banks as a matter of patriotic service rather than as a matter of business. National banks are not the exclusive fiscal agents for the United States Government in the sale of its savings bonds. State banks perform similar service for a nominal consideration.

The defendant has made much ado of the fact that it was required and did make periodic financial reports to the United States Comptroller of Currency on forms furnished by him which dealt in part with data dealing with its "time deposits" under the heading of "savings deposits" printed in the forms so furnished by him. This evidence was introduced by the defendant to support their contention that same had probative value upon the construction by the trial court of the "Federal Reserve Act" (12 U. S. C. A. § 371) that same was a superseding paramount statute because the New York statute allegedly contemplated a prohibition of the use by the defendant of the term "savings deposits" in such reports. Inferentially the defendant argued that the enforcement of the New York Statute by the granting of the permanent injunction sought by this action would enjoin the defendant from using the forms of the United States Comptroller of Currency be-

cause of the data required therein under the heading "savings deposits". All of this argument by the defendant is without legal force because it has already been demonstrated that under the adjudicated Federal and State cases construing the purpose of Section 258, subdivision 1 of [fol. 701] the New York Banking Law, it was ruled that financial institutions not authorized as a savings bank or savings loan association were enjoined "in its business" with the public from using the prohibited terms because of their tendency of deceiving the public in believing that such financial institutions were not organized or authorized as savings banks with all of their attendant benefits. The statute also plainly indicates that all advertising by such unauthorized financial institutions are restrained from using the prohibited terms in relation to their business. A fortiori, the use of the term "savings deposits" in private and confidential reports by national banks to the United States Comptroller of Currency can hardly be said to be public deception within the spirit and letter of the statute or that the use of the term "savings deposits" in such report was "in its (defendant's) banking or financial business" so as to violate the statute.

During the course of the trial defendants' counsel endeavored without success to introduce in evidence two pamphlets which he claimed to be regulations made by either the United States Comptroller of Currency or the Board of Governors of the Federal Reserve System, which he claimed would tend to aid the Court to arrive at a construction of the Federal Reserve Act (12 U. S. C. A. § 371) sustaining defendants' contention that it was a paramount and superseding statute by implication. Such offered documentary proof was not properly authenticated and was on my objection excluded not only on that ground but also because of the contention that the contents thereof [fol. 702] were otherwise incompetent immaterial.

Since the trial of the action, I was informed by Herbert Dannett, Esq., one of defendants' associate counsel, that the aforementioned regulations were published in the Federal Digest and that in conformity with the principle enunciated in *Quaker Oats Co. v. City of New York*, 295 N. Y. 527, your Honor will be urged by the defendant to

take judicial notice thereof. Not having a copy of such regulations and not having the reference thereto in the Federal Digest, I have no means of knowing the text or substance thereof. However, of one thing I am certain, i. e. that any regulations which either the United States Comptroller of Currency or the Board of Governors of the Federal Reserve System might have made to implement the Federal Reserve Act could not lawfully extend or amplify the same (12 U. S. C. A. § 371) so as to expressly authorize national banks to advertise for "time deposits" by the use of the term "sav-ng" or "savings" or their equivalent because the measure of powers of national banks is the statutory grant, and powers not conferred by Congress are denied (*City of Yonkers v. Downey*, 309 U. S. 590; *Texas & Pac. Ry. Co. v. Pottoroff*, 291 U. S. 245). Moreover, no power is conferred upon an administrative government agency to make and enforce an interpretation of laws affecting such agency; such power being a judicial one, to be exercised by the Courts alone (*U. S. ex rel Kreh v. Ingham*, 38 App. D. C. 379). In the final analysis, the power of an administrative officer to prescribe regulations [fol. 703] (5 U. S. C. A. § 22) does not carry with it the power to make law (*U. S. v. Powell*, 95 F. [2d] 752, certiorari denied 305 U. S. 519). Then again, regulations must be consistent with law; they may not be extended so as to alter, amend or defeat a law already enacted by Congress (*Morrill v. Jones*, 106 U. S. 466. *Campbell v. U. S.*, 107 U. S. 407; *Williamson v. U. S.*, 207 U. S. 425). In this connection, it is of special significance that the Federal Reserve Act (12 U. S. C. A. § 461) expressly enjoins the Board of Governors of the Federal Reserve System adopting or promulgating any regulations defining the terms "time deposits" and "savings deposits" which gives both of these terms separate meaning it being provided in said Act that "the term 'time deposit' shall include 'savings deposits'".

Paton's Digest and the Opinions of General Counsel to the Federal Reserve Board and the United States Comptroller of Currency cited by counsel for the defendant in their trial brief (pp. 13-18) as authority for construing the Federal Reserve Act as a right by implication conferred

by Congress upon national banks to advertise for "time deposits" by the use of the term "savings" are obviously valueless as authority for such proposition urged by the defendant, since same are based upon the erroneous premise that a statute representing an exercise of the police power of the State can be destroyed or superseded by implication of the provisions of a Federal statute. However, as we have already observed the weight of authority is that no implied right can be deemed conferred by an act of Congress to [fol. 704] supersede or destroy an exercise of the police power of the State as exemplified by Section 258, Subdivision 1 of the New York State Banking Law.

Section 258, subdivision 1 of the New York State Banking Law does not, as the defendant contends, unduly discriminate against national banking associations located in New York State nor handicap them substantially to compete with savings banks and savings and loan associations.

It is a general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions (12 American Jurisprudence on Constitutional Law §§ 504 and 505, pp. 185-187 and the cases there cited). The discriminations which are open to objection are those in which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions (*Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26; *Soon Hing v. Crowley*, 113 U. S. 703; 12 American Jurisprudence on Constitutional Law § 505; 187). Part of the liberty of a citizen consists in the enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property (12 American Jurisprudence on Constitutional Law § 505, p. 187). The constitutional guaranty as to the equal protection of the laws, moreover, [fol. 705] requires that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under similar circumstances and that no greater burdens in engaging in a calling should be laid upon one than are laid upon others in the same calling and condition (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540;

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79; 12 American Jurisprudence on Constitutional Law § 505, p. 187).

The practical application of the general principle of classification in accordance with the constitutional requirements as to equal protection of the laws is illustrated in the case of banks and bankers. The courts have recognized that the banking business may properly form a class by itself for legislative regulation, and that as between banks and bankers themselves, different classes may properly exist (12 American Jurisprudence on Constitutional Law § 506, pp. 186-188).

In *Provident Savings Institution v. Malone*, 221 U. S. 660, wherein the United States Supreme Court considered the constitutionality of a statute which directed savings banks to turn over to the proper State officers money in accounts inactive for 30 years, the Court held that such statute does not deprive savings banks of their property without due process of law and is not a denial of equal protection of the law, because it applies only to savings banks, the classification not being unreasonable. In that [fol. 706] case, the Court with equal application to the facts in the case at bar said at page 666:

“There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage-earners, moving from place to place, there is special reason for intervening to protect their interest in this class of property in banks as to which the State's supervisory power is constantly exercised.”

From the foregoing, it becomes crystal clear that Section 258, Subdivision 1 of the New York State Banking Law does not discriminate against the defendant as a national bank because the legislation affects alike all commercial banks inclusive of national banks who pursue the

same business under the same conditions. This becomes all the more obvious when it is recalled that savings banks and savings and loan associations do not pursue the same business under the same conditions as commercial banks.

That the provisions of Section 258, Subdivision 1 of the New York State Banking Law was a reasonable exercise of the police power of the State, persuasively appears from [fol. 707] a reading of the published official Opinion of the Attorney General (1922, Op. Atty. Gen. 139, 140) as follows:

"Savings banks in New York have long been nurtured by the laws of this State as institutions of peculiar reliability, administered under a trust upon which the small investor and inexperienced could rely. Police power statutes are also often enacted for the purpose of protecting the public from its own folly. Bearing in mind these considerations, the statute becomes as one seeking to protect a trade name, borne by a particularly regulated and supervised class of institutions from an unfair competition. It likewise becomes clear that business rivals seeking to profit from the 'savings' public find it desirable to imitate or at least, derive the benefit of a name long used by institutions so solidly founded and protected. Reasons for a literal reading of the statute thus become apparent."

In 7 American Jurisprudence on Banks, Section 13, p. 33, it is appropriately stated:

"Not all regulation of a national bank by the state in which it is situated is prohibited. The doctrine of noninterference by a state with the operations of a national bank protects the bank only from such legislation as tends to impair its utility as an instrumentality of the Federal government. A national bank is subject to the laws of the state in which it is located in respect of its affairs if such laws do not interfere [fol. 708] with the purpose of its creation, tend to impair or destroy its efficiency as a Federal agency, conflict with the paramount laws of the United States, or discriminate against such national bank."

respectfully submit that under the authorities cited by main and supplemental briefs heretofore delivered to the Court and above stated, the plaintiffs are entitled to a permanent injunction as prayed for in the complaint because the uncontradicted evidence shows a clear violation of Section 258, Subdivision 1 of the New York State Banking Law. Moreover, the defendant has failed to adduce sufficient evidence or a fair preponderance of the evidence negating its affirmative defenses contained in its answer. Basically, therefore, we must conclude that Section 258, Subdivision 1 of the New York State Banking Law is valid and enforceable because:

- a) It is not in conflict with a Federal paramount statute and the provisions, therefore, do not interfere with the purpose of defendant's creation nor do they tend to impair or destroy defendants' efficiency as a Federal agency.
- b) It does not unduly discriminate against national banking associations located in New York State nor handicapped them substantially to compete with savings banks and savings and loan associations.

I wish to emphasize that all of the evidence adduced by the defendant tended to show that it would be convenient [cf. § 709] for national banks and commercial banks generally to be free from the restrictions of the provisions of Section 258 of the New York State Banking Law. However, such evidence does not support a possible contention that it is absolutely indispensable to conduct a profitable commercial banking business to be free of such restrictions. Accordingly, the Federal Reserve Act, aside from all other considerations, can not be deemed to confer upon national banks the right by implication to use the terms "savings" or "savings" or their equivalent because of the principle enunciated by the Court of Appeals in *Lawrence Constr. Corp. v. State of New York*, 293 N. Y. 634, 639, reiterating the Federal applicable Rule as follows:

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature

had envisaged all the problems and complications which might arise in the course of its administration. A power not expressly granted by the statute is implied only where it is 'so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the Legislature. The implied power must be necessary, not merely convenient, and the intention of the legislature must be free from doubt.' (*Peo. ex rel. City of Olean v. W. N. Y. & P. T. Co.*, 214 N. Y. 526, 529.)"

In conclusion, I respectfully submit that it does not appear beyond a rational doubt that the New York statute is [fol. 710] unconstitutional, and under the Rule promulgated by the United States Supreme Court, the statute must be held constitutional by a Trial Court (*Sinking Fund Cases*, 99 U. S. 18; *Powell v. Pennsylvania*, 127 U. S. 678).

The defendants' appeal for relief must be to the Legislature. In this connection, the United States Supreme Court in *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, at pp. 190 and 191, pertinently said:

"When the action of a legislature is within the scope of its power, fairly debatable questions as to the reasonableness, wisdom and propriety are not for the determination of Courts, but for the legislative body, on which rests the duty and responsibility of decision."

To the same effect:

Powell v. Pennsylvania, 127 U. S. 678, 686.

A copy of this letter has this day under separate cover been mailed to Alley, Cole, Grimes and Friedman, Esqs., the attorneys for the defendant.

Respectfully yours, Nathaniel L. Goldstein, Attorney General,
By: Irving L. Rollins, Assistant Attorney General.

fol.711] PLAINTIFF'S EXHIBITS 1, 2 AND 3

Advertisement appearing in the Long Island Daily Press
n March 10 and 24, 1947, and in the Nassau Daily Review-
tar on March 17, 1947:

2% Interest on Savings Accounts between \$100 and
1,000.

1½% on balances over \$1,000.

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The Franklin Square National Bank

Long Island's Leading Loan & Mortgage Institution

Franklin Square, L. I., N. Y.

Member, Federal Deposit Insurance Corp.

PLAINTIFF'S EXHIBIT 4

Advertisement appearing in Newsday, May 8, 1948:

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Interest on Savings Accounts Between \$100 and \$1000.

1½% on Balances Over \$1000.

Franklin Square National Bank

Franklin Square, L. I., N. Y.

Member Federal Deposit Insurance Corp.

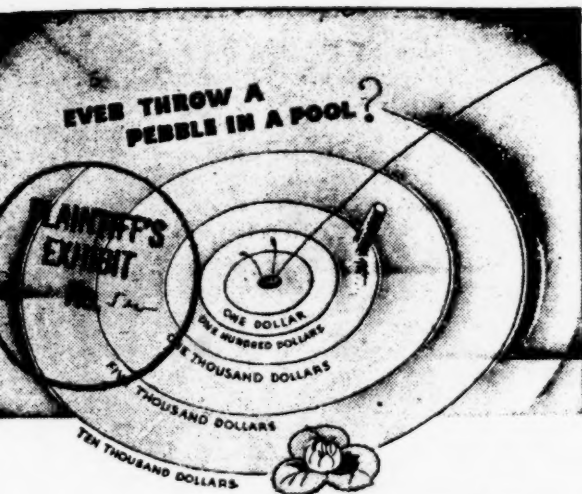
(Here follow 3 photographs, side fols. 712-713, 714-715,
716-717.)

ols. 712-713]

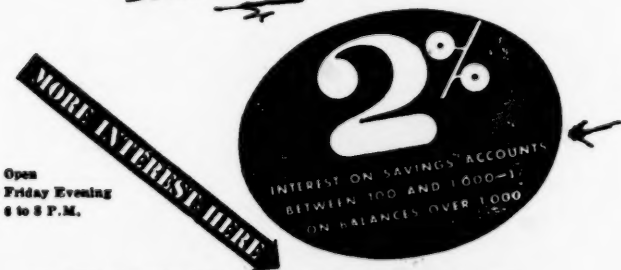
PLAINTIFF'S EXHIBIT 5

530A

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THE FRANKLIN SQUARE NATIONAL BANK
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ADDRESS _____

CITY, STATE No., STATE _____

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WIDE INTEREST

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[fols. 716-717] PLAINTIFF'S EXHIBITS 7, 8 and 12

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1950

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When you open your checking or savings account at Franklin National, you take an important first step. But it is merely a first step. If you stop there, you stop too soon. This should just begin our usefulness to you!

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BE SURE, quick way to build your cash reserve—regular deposits in a Franklin National interest-paying Savings Account! A special welcome here for the folk. Save first—then Save—and have!

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THE REGULAR KIND

FOR BUSINESS and personal use. Provides safety for funds, convenience in paying bills, receipts for all expenditures and a record of your expenses. All checks photographed for extra protection. Small service charge—or none at all—depending on balance maintained and number of checks written.

THE ECONOMY KIND

A BANKING bargain for you—10 checks for just \$2.00! No minimum balance required—Only 25¢ per month. Great for the occasional check user—thousands of salaried people, housewives, professional men and women, etc., enjoy Franklin National Economy Checking Accounts. Join them!

INVESTMENT INFORMATION

FRANKLIN NATIONAL maintains full information on all securities, including U. S. Government issues, and handles customers' orders for buying and selling. Stock and bond ratings by recognized agencies. You are invited to confer with us on investment matters.

TRADE DATA

STATISTICS and credit information, business trends and commercial data of all kinds, as supplied by the most authoritative sources, always available.

LOANS

PERSONAL LOANS

LOW bank rates and easy repayment by way of installments adapted to your income. You can borrow for any number of constructive purposes—educational expenses, medical or hospital bills, savings in cash purchases, insurance premiums, business opportunities and so on.

AUTO LOANS

ASK ABOUT our money-saving plan on new cars—the lowest cost you can find! Loans made on used cars too. See Franklin National FIRST!

MORTGAGE LOANS F.H.A. LOANS

FOR THE home builder or buyer—on regular bank or F.H.A. terms. Helpful cooperation here always.

SMALL BUSINESS LOANS

OUR BUSINESS is to help you and your business—and size doesn't matter. Franklin National always has a welcome for the small business man who is looking ahead—a welcome, and whatever financial assistance sound banking permits.

INSURANCE AND COLLATERAL LOANS

QUICKLY arranged on the basis of borrower's pledging life insurance, stocks, bonds or other assets.

HOME REPAIR LOANS

NEED a new Roof? Heating Plant? Garage? Other approved improvements? The place to borrow, if you need money, is where you'll get reasonable rates and friendly service—Franklin National!

COMMERCIAL LOANS

LONG or short term lines of credit for business and industry. When you'd like to discuss financial accommodations in an atmosphere of cordiality and understanding, drop in for a talk with one of our officers.

BANK MONEY ORDERS

A SAFE and inexpensive way to send money. Quickly issued—and we believe you'll be surprised how very small the cost!

BANK-BY-MAIL SERVICE

YOU ARE always near a mail box—and our special envelopes and forms make it easy to "bank by mail". If it is not convenient to visit one of our offices, enjoy this service.

SAFE DEPOSIT BOXES

and BULK STORAGE. The safe place for all kinds of valuable papers, gems, silver, heirlooms and the like. Easily accessible—on our main floor. Positive protection against loss from fire, theft and negligence. Boxes as low as \$5.00 a year.

U.S. SAVINGS BONDS ISSUED - REDEEMED

GOVERNMENT Savings Bonds issued to you "on-the-spot". We redeem them, too, when circumstances compel redemption, but we strongly advise holding until maturity.

NIGHT DEPOSITORY

A VALUABLE convenience to business houses. Available not only at our main office, but also at our Elmont office.

REMITTANCES AND COLLECTIONS

NEW YORK exchange, cashiers checks, etc., for transmitting funds. Far-flung banking connections—state, national, foreign—for collections. To many correspondents, we route items direct. Service can be no faster on out-of-town collections!

TRAVELERS CHECKS

AT TRIFLING cost, Travelers Checks assure the safety of your personal funds while you are away from home. Let us issue you yours before you start your next trip.

FOREIGN EXCHANGE

THE FAST, safe way for transfer of funds to other countries. Economical, too. Full information and rates cheerfully given on request.

FREE PARKING

WHILE transacting your business in Franklin National. Paved parking place at rear of bank. A time and trouble saver for our customers.

2

**CONVENIENT
OFFICES**
Franklin Square
Elmont

Whatever your financial problem... SEE FRANKLIN NATIONAL FIRST



[fol. 718]

PLAINTIFF'S EXHIBIT 9A

Envelope

The Franklin National Bank
Levittown Center

2943 Hempstead Turnpike
Levittown, N. Y.

This Envelope Contains:

1. Savings Account—Signature Card and Deposit Ticket
2. Special Checking Account—Signature and Deposit Ticket
3. Children's Savings Account—Signature Card
4. Request Card—For Many Other Services

Watch Your Local Papers for the List of Gifts and Opening Date.

(Back Side of Envelope)

Save Time! Complete These Forms and Bring Them to
The Franklin National Bank With Your Deposit.

[fol. 719]

PLAINTIFF'S EXHIBIT 9B

Envelope

This Envelope Contains Forms For the Opening of a Savings Account.

Instructions:

Signature Card

1. If individual account
 - (a) Sign name and print address
 - (b) Complete information on reverse side of card
2. If joint account of husband and wife
 - (a) Both are to sign signature card
 - (b) Print address where indicated
 - (c) Complete information on reverse side of card
3. If trust account for son, daughter or other relative
 - (a) Depositor is to sign own name
 - (b) Print after signature, "In trust for (Name)..... (Relationship)"
 - (c) Print address and complete information on reverse side of card

Deposit Ticket

1. Print name or names exactly as account is to read
2. Fill in amount of cash and/or checks where indicated

(Back of Envelope)

The Franklin National Bank
2943 Hempstead Turnpike
Levittown, N. Y.

Save—Out of Income!

2% Interest is paid on all savings balances between \$100 and \$1000. 1½% on balances over \$1000.

[fol. 720]

PLAINTIFF'S EXHIBIT 9C

Envelope

This Envelope Contains Forms For the Opening of a
Children's Savings Account.

Instructions:

1. Print name, address and date of birth of child
2. Have child sign signature card. If unable, parent may sign child's name
3. Accounts may be opened for children up to 15 years of age
4. Deposits are acceptable only in even dollar amounts up to an aggregate of \$200

2% Interest on All Balances.

(Back Side of Envelope)

The Franklin National Bank


2943 Hempstead Turnpike
Levittown, N. Y.

A Lollypop With Every Deposit!

(Here follows 1 photograph, side folio 721.)

DEPOSIT SLIP

**DEPOSITED WITH
THE FRANKLIN NATIONAL BANK
OF LEVITTOWN, N. Y.
NAME OF ACCOUNT**

 BOOK NUMBER	
---	--

C

DATE _____

SAVINGS DEPARTMENT

	DOLLARS	CENTS
BILLS		
COIN		
CHECKS		
TOTAL \$		

In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

[fol. 722]

PLAINTIFF'S EXHIBIT 9E

Card

C

Type Last Name First

Account Number

Savings Department

I/We hereby agree that this account when accepted shall be governed by the rules and regulations of The Franklin National Bank of Franklin Square, New York, relative to Savings Accounts, as contained in my/our pass-book. If there be more than one undersigned, each of us declare this account to be a joint account payable to either of us or to the survivor. Each of the undersigned does hereby authorize the other to endorse for deposit and to deposit in the said account checks and other instruments for the payment of money belonging to either or to both of us.

(1) Signature

(2) Signature

Address

Opened By.....Initial Deposit.....

Date

Description of Depositor (1)

Birth Place.....Date of Birth.....

OccupationHome Telephone.....

[fol. 723] Description of Depositor (2) or the Beneficiary
of a Trust

Birth Place.....Date of Birth.....

OccupationHome Telephone.....

Relationship of Beneficiary to Depositor (1)

Introduced by

(Identification)

PLAINTIFF'S EXHIBIT 9F

Children's Card

.....C

Type Last Name First

Account Number

Children's Savings Department

I hereby agree that this account when accepted shall be governed by the rules and regulations of The Franklin National Bank of Franklin Square, New York, relative to Children's Savings Accounts, as contained in my pass book.

Signature

Address

Date of Birth.....

Opened By.....Initial Deposit.....

Date



[fol. 724]

PLAINTIFF'S EXHIBIT 9G

Card

.....C

Type Last Name First

Account Number

Special Checking Department

I/We hereby agree that this account when accepted shall be governed by the rules and regulations of The Franklin National Bank of Franklin Square, New York, relative to Special Checking Accounts, as contained in my/our checkbook filler. If there be more than one undersigned, each of us declare this account to be a joint account payable to either of us or to the survivor. Each of the undersigned does hereby authorize the other to endorse for deposit and to deposit in the said account checks and other

instruments for the payment of money belonging to either
or to both of us.

Signature

Signature

Address

Opened by.....Initial Deposit.....

Date

Employed By

Business Address

Home Telephone.....Business Telephone.....

Bank Reference

.....

Other Reference

Introduced By

(Identification)

(Here follows 1 photograph, side folio 725.)

DEPOSIT SLIP

DEPOSITED WITH
THE FRANKLIN NATIONAL BANK
 OF LEVITTOWN, N. Y.

C

In receiving items for deposit or collection, this Bank acts only as depository's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or without credit. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send items, directly or indirectly, to any bank including the payer, and accept its draft or credit on conditional payment in line of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.


	DOLLARS	CENTS
BILLS		
COIN		
CHECKS	LIST CHECKS BELOW	
(LIST SEPARATELY) 1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
TOTAL		

PLEASE ENDORSE ALL CHECKS

SPECIAL CHECKING DEPARTMENT

FOR ACCOUNT OF

C

 ACCOUNT NUMBER	
--	--

DATE _____

[fol. 726]

PLAINTIFF'S EXHIBIT 9I

Envelope

This Envelope Contains Forms For the Opening of a
Special Checking Account.

Instructions:

Signature Card

1. If individual account
 - (a) Sign name and print address
 - (b) Complete information on reverse side of card
2. If joint account of husband and wife
 - (a) Both are to sign signature card
 - (b) Print address where indicated
 - (c) Complete information on reverse side of card
 - (d) Checks may be signed by either

Deposit Ticket

1. Print name or names exactly as account is to read
2. Fill in amount of cash and/or checks where indicated

(Back Side of Envelope)

The Franklin National Bank

2943 Hempstead Turnpike
Levittown, N. Y.

No Minimum Balance Requirements.

Ten Cents Per Check—No Charge for Deposits.

[fol. 727]

PLAINTIFF'S EXHIBIT 9J

Business Reply Card

Postage Will be Paid by Addressee.

No Postage Stamp Necessary if Mailed in the United States.

Business Reply Card

The Franklin National Bank
Levittown Center2943 Hempstead Turnpike
Levittown, N. Y.

(Back of Card)

Please send me literature for the following:

(Personal)

- 1.
- ☐
- Opening a regular Checking Account.

(Business)

2. ☐ Renting a Safe Deposit Box (Special offer \$1.20 for first year—Regular charge \$6.00).
3. ☐ Application for an ☐ Application for a Mortgage Loan.
 Auto Loan. ☐ Application for a Business Loan.
 ☐ Application for a Personal Loan. ☐ Application for a Garage Loan.
 ☐ Application for a FHA Modernization Loan.

- 4.
- ☐
-

Name

Address

[fol. 728]

PLAINTIFF'S EXHIBIT 9K

Draft

We Will Transfer Your
Savings Account From
Another Bank.

1. Fill in the attached draft.
 2. Complete signature card in savings account envelope.
 3. Present draft, signature card and your passbook to
The Franklin National Bank,
Levittown, N. Y.
 4. Balance will be collected for you without charge and credited to your account with us.
- Note: to preserve your interest for the current period, date this draft July 1, 1950.
- Patronize Your
Community Bank

.....19..
\$ Balance of Account with interest
At Sight—Pay to the order of
The Franklin National Bank
2943 Hempstead Turnpike
Levittown, N. Y.
the Balance of Account with interest to date
and charge to Account No....., Passbook attached.
To: Bank
.....
..... Signature
.....
..... Signature

[fol. 729]

PLAINTIFF'S EXHIBIT 10A

Envelope

Postage Will be Paid by Addressee.

No Postage Stamp Necessary if Mailed in the United States.

Business Reply Envelope

The Franklin Square National Bank

315 Hempstead Turnpike
Franklin Square, N. Y.

[fols 730-731] (Here follows 1 photograph, side folios
730-731.)

LETTER

the parade is on...



Thousands of forward-looking citizens consistently save at the Franklin Square National Bank--and with good reason! They know that the wisest investment today is a savings account. Not only are dividends earned now, but--by avoiding unnecessary buying at today's inflated prices--saved dollars will purchase more later on.

A savings account at Franklin Square offers you these special benefits as well!

Your savings account earns maximum dividends at Franklin Square. Accounts from \$100. to \$1,000. earn a full 2% interest--amounts over \$1,000. earn 1½%. New residents (and many old timers, too) find that it pays in dollars and cents--as well as in convenience--to bank at Franklin Square.

Many of our new depositors have recently bought homes in Nassau County and have asked us to transfer their accounts from banks in their former neighborhoods, to ours. We will be glad to do the same for you. The transaction is quite simple and can be handled entirely by mail--all it takes is your signature on one of our forms. What's more--if we arrange this transfer for you before July 10th--interest will be credited to your account from July 1st.

How can you take care of this? Just bring your passbook into the bank--sign a simple form--and we will take care of the rest. Or else, send us your passbook in the postpaid return envelope and we'll handle everything by mail.

As a "Special Incentive" for coming in or writing us before July 10th--and to further acquaint you with the advantages of banking at Franklin Square--you can enjoy protection of your valuables "Rent Free" for one year in Long Island's newest vault. A regular \$5.00 Safe Deposit Box will be assigned to you upon opening or transferring a Savings Account of \$100. or more.

Act now for the special advantages of having the interest on your account start July 1st and for securing the Safe Deposit "Special". Act now and enjoy the permanent advantages of Franklin Square's friendly and courteous service. Come in any weekday from 9 A. M. to 3 P. M. or on Friday evening from 6 to 8 P. M. Or, if you prefer, simply fill in and mail the enclosed form--using the postpaid return envelope. It will receive our prompt and careful attention.

Sincerely,

President

THE FRANKLIN SQUARE NATIONAL BANK
FRANKLIN SQUARE, LONG ISLAND

Member Federal Deposit Insurance Corporation

BLEED THROUGH

FOLLOWING FOLIOES 72-100

[fols. 732-733] PLAINTIFF'S EXHIBIT 10C

Application Slip

The Franklin Square National Bank
Franklin Square, Long Island, N. Y.

Date.....

Dear Mr. Roth:

I want to take advantage of *all* the special benefits of a Franklin Square Savings Account.

Please Check

- ☐ I would like to open a Franklin Square Savings Account. Send me necessary forms.
- ☐ I am enclosing \$. to open a Franklin Square Savings Account at once. Send me the necessary signature card.
- ☐ I would like to transfer my account to the Franklin Square National Bank. I am enclosing my pass book so that you can send me completed forms for my signature.
- ☐ Reserve my Safe Deposit Box (rent free for one year on any new or transferred account of \$100 or more).

Name Address

(please print)

[fol. 736]

PLAINTIFF'S EXHIBIT 13B

Withdrawal Slip

Franklin Square, N. Y.....195..

Received from The Franklin National Bank Savings
Department

\$.....

Amount Dollars

Charge to Account No.....

Signature

Savings Pass Books Must Be Presented With This Re-
ceipt.

PLAINTIFF'S EXHIBIT 14

"Dime Saver" Issued by Defendant-Respondent Bank
(Omitted pursuant to stipulation)

PLAINTIFF'S EXHIBIT 15A

April 16, 1947

Mr. Arthur T. Roth, President,
The Franklin Square National Bank,
Franklin Square, L. I., N. Y.

Dear Mr. Roth:

We refer to our letter of March 25 and subsequent correspondence and will be pleased to have your confirmation that the use of the word "savings" in advertising and other literature has been discontinued, in accordance with the requirements of an Attorney General's opinion of which we sent you a copy.

Very truly yours,

Deputy Superintendent of Banks.

chs:rs.

[fol. 737]

PLAINTIFF'S EXHIBIT 15B

April 3, 1947

Mr. Arthur T. Roth, President,
The Franklin Square National Bank,
Franklin Square, L. I., N. Y.

Dear Mr. Roth:

As requested in your letter of March 29, I am enclosing the opinion to which I referred in my letter of March 25. This has been given me by the Legal Division of this Department, which informs me that it is the basis of the position taken on the subject and is in full force and effect at this time.

Very truly yours,

Deputy Superintendent of Banks.

Encl, chs:rs.

PLAINTIFF'S EXHIBIT 15C

March 25, 1947

The Franklin Square National Bank,
Franklin Square, L. I., N. Y.
Attention: Mr. Arthur T. Roth, President

Gentlemen:

Our attention has been directed to advertisements which are understood to have appeared in the Long Island Press and in the Nassau Daily Review Star within the past two weeks, in which it is indicated that 2% interest on savings accounts between \$100 and \$1,000 will be paid. We last wrote you on this subject on May 29, 1945. Since an attorney-general of this state has given it as his opinion [fol. 738] that the use of the word "savings" by a national bank is a violation of law, we must request that your advertising and use of the word in other literature be discontinued.

We would appreciate your confirmation that steps have been taken to correct the circumstances.

Very truly yours,

Deputy Superintendent of Banks.

chs:rs.

PLAINTIFF'S EXHIBIT 16

Identification Card of Bank Examiner

Arthur R. Seaton

State of New York—Banking Department

Office of Superintendent of Banks

January 2, 1951

This is to Certify That Arthur R. Seaton, a duly appointed Examiner of this Department, is authorized to examine institutions, corporations and individuals which have been authorized, or have applied for permission to do business under the provisions of the Banking Law of the State of New York together with any corporations affiliated therewith; also to make special investigations of any individual, partnership, corporation or unincorporated association, for the determination of Banking Law violations.

This authority expires December 31, 1951.

William A. Lyon, Superintendent of Banks.

Arthur R. Seaton, Signature of Examiner.

6572

[fol. 739]

PLAINTIFF'S EXHIBIT 17

Name: Franklin National Bank

Examiner's Comments

April 10, 1950

Hon. William A. Lyon,
Superintendent of Banks,
Albany, N. Y.

Dear Sir:

Under instructions of Attorney J. F. Carlucci, the writer visited the Franklin National Bank, Franklin Square, L. I., N. Y. for the purpose of ascertaining whether this bank is using the word "Savings" in violation of Section 258 of the Banking Law.

The bank is separated into three distinct sections, the corner building contains the commercial accounts (main

floor) and the building next facing Franklin Square contains the "savings" accounts on the main floor, and in the back of this department you will find the installment loan department. In walking from the commercial banking floor to the savings department, you pass through a small opening about 5 feet wide, the first thing you see is a large glass sign about three feet long and one foot wide hanging from the ceiling saying "Savings"; in back of this large sign there are six tellers' windows five of which have glass signs saying "Savings' Christmas Club" and the sixth window has a sign saying "Children's Savings".

There is a large circular counter in the middle of the floor with a sign that says "New Accounts". The banking floor appears to be set up to look like the main floor of any modern savings bank.

There is a large sign over the tellers' window with the following advertisement.

[fol. 740] "2% interest on savings accounts between \$100 and \$1,000.

1½% on balances over \$1,000".

On March 29, 1950 this bank advertised that they had savings accounts in the following papers:

Newsday	page 36
Nassau Daily Review-Star.....	" 2
Long Island Daily Press.....	?

A copy of the Newsday and Nassau Daily Review-Star will be found attached to this report. I was unable to purchase the Long Island Daily Press at the office as there were none left, but I did see the same advertisement in the Press that appears in the other papers.

Attached to this report you will find a sample of the deposit and withdrawal slip used by this bank—also a coin saving card.

The large advertisement attached to this report was found on the various desks used by the depositors. This advertisement is the same one appearing in the newspapers reported above.

I did not approach any of the officers of this bank.

The Valley Stream National Bank and Trust Company, Valley Stream, N. Y. used the word "Savings" in its advertisement in the Nassau Daily Review-Star on March 31, 1950. The advertisement will be found on the last page of the newspaper attached to this report.

Respectfully submitted,

A. R. Seaton, Examiner.

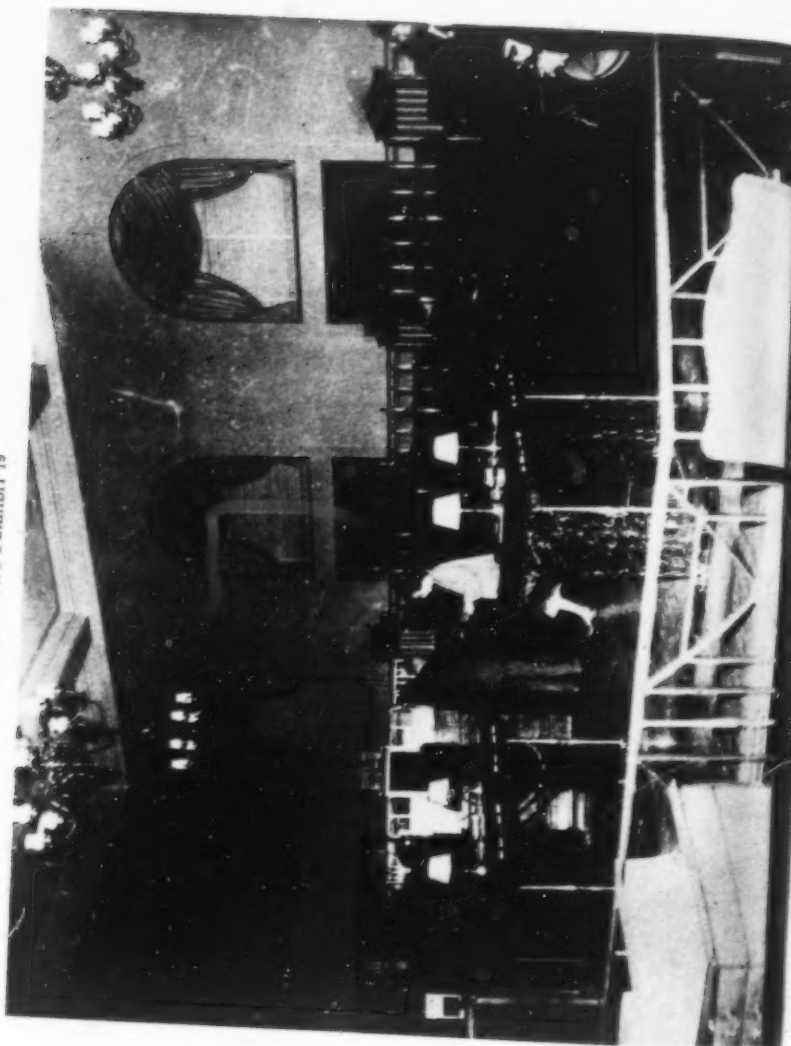
584

PLAINTIFF'S EXHIBIT 18

BLEED THROUGH



PLAINTIFF'S EXHIBIT 19



587

PLAINTIFF'S EXHIBIT 20



744-745

COPY 50112

PLAINTIFF'S EXHIBIT 21

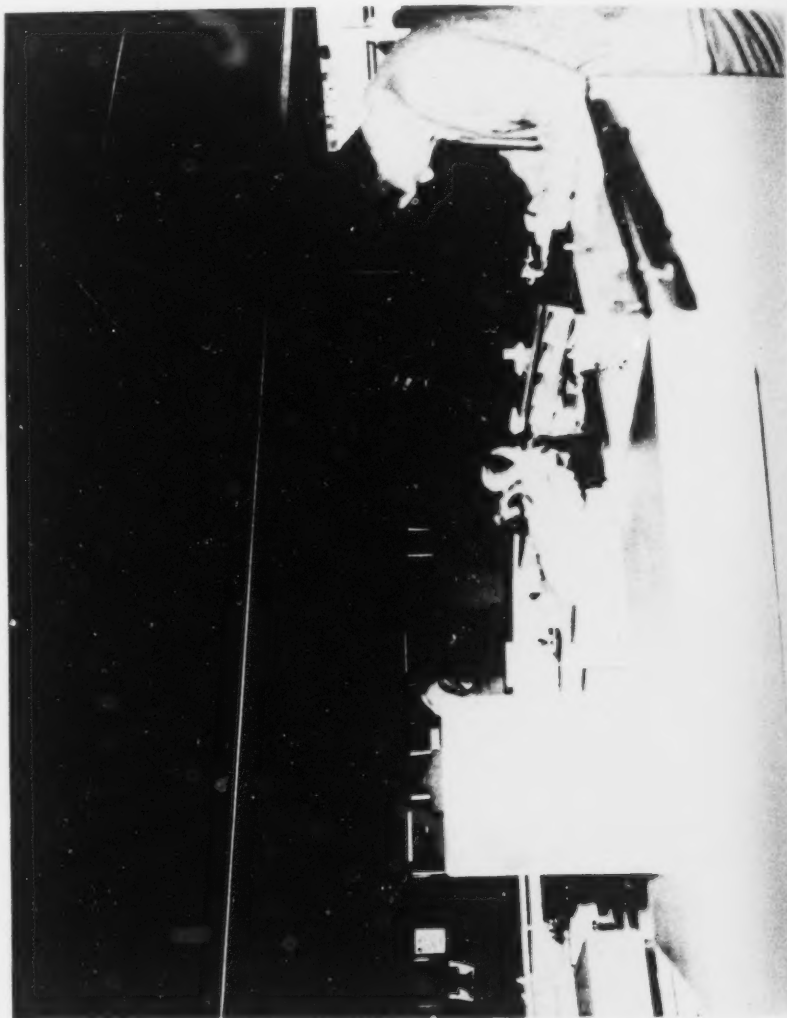




748=749

590

PLAINTIFF'S EXHIBIT 23



750-751

PLAINTIFF'S EXHIBIT 24



752-753

PLAINTIFF'S EXHIBIT 25

11



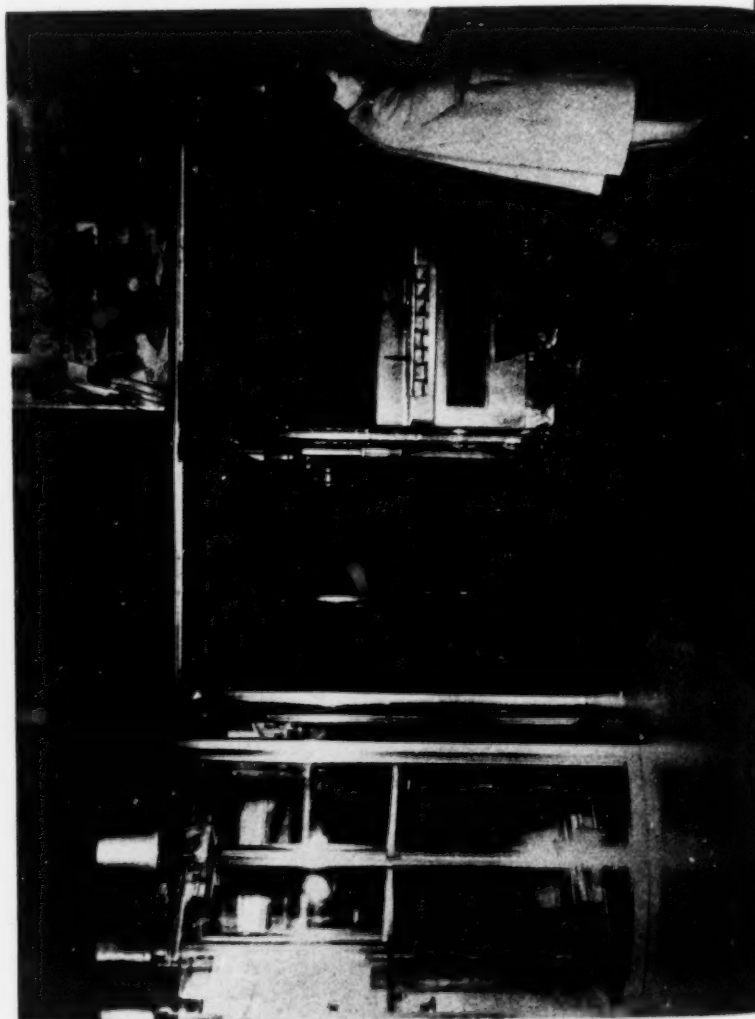
754-755

PLAINTIFF'S EXHIBIT 26



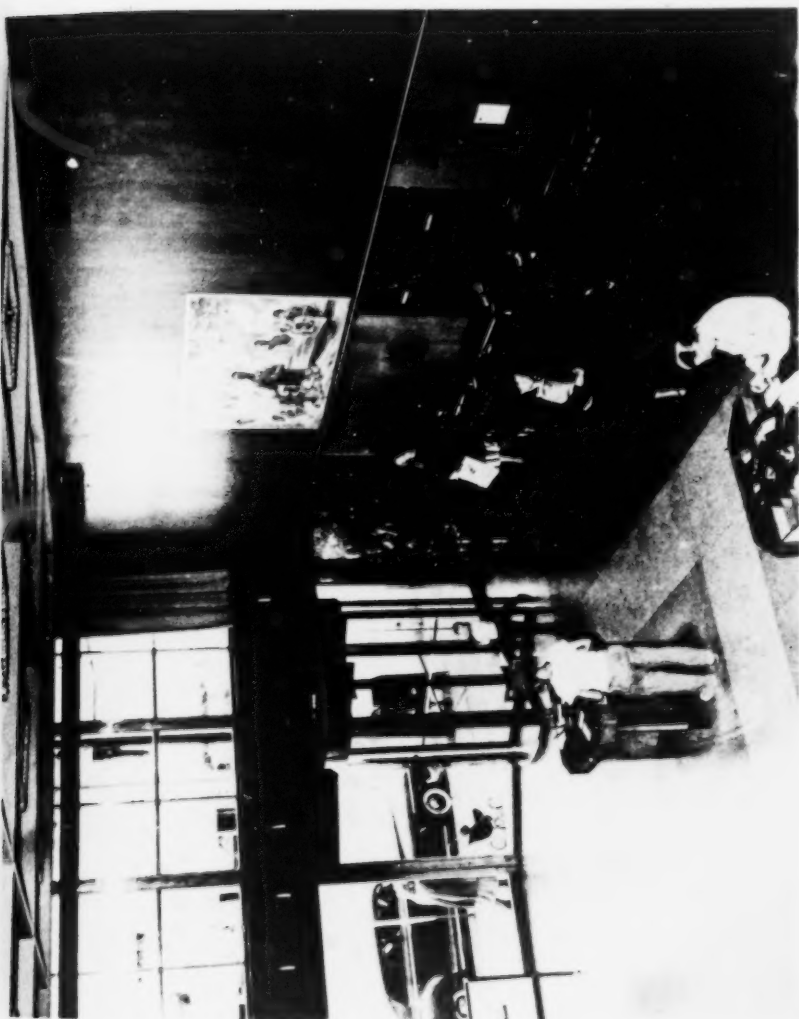
756-757

PLAINTIFF'S EXHIBIT 27



758-7

PLAINTIFF'S EXHIBIT 28



760=762

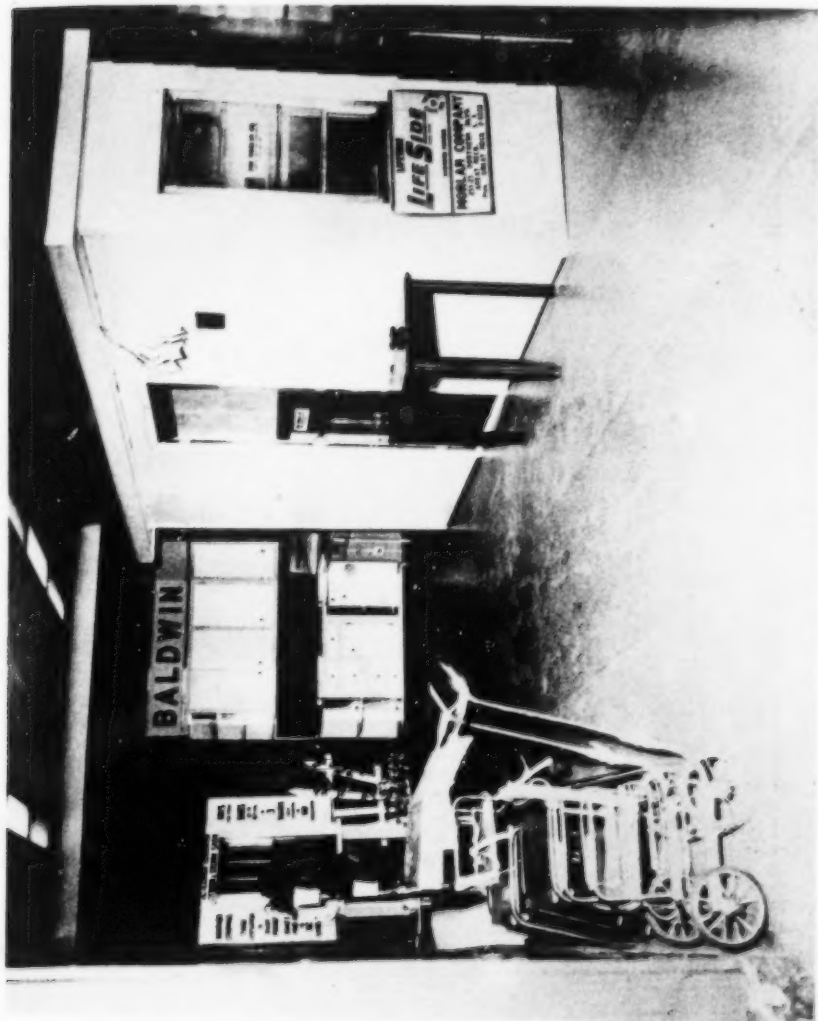
[fols. 763-764] PLAINTIFF'S EXHIBIT 29

(Omitted. Printed side pages 725 and 735 ante.)

(Here follow 3 photographs, side folios 765-766, 767, 768-
769)

598A

PLAINTIFF'S EXHIBIT 30

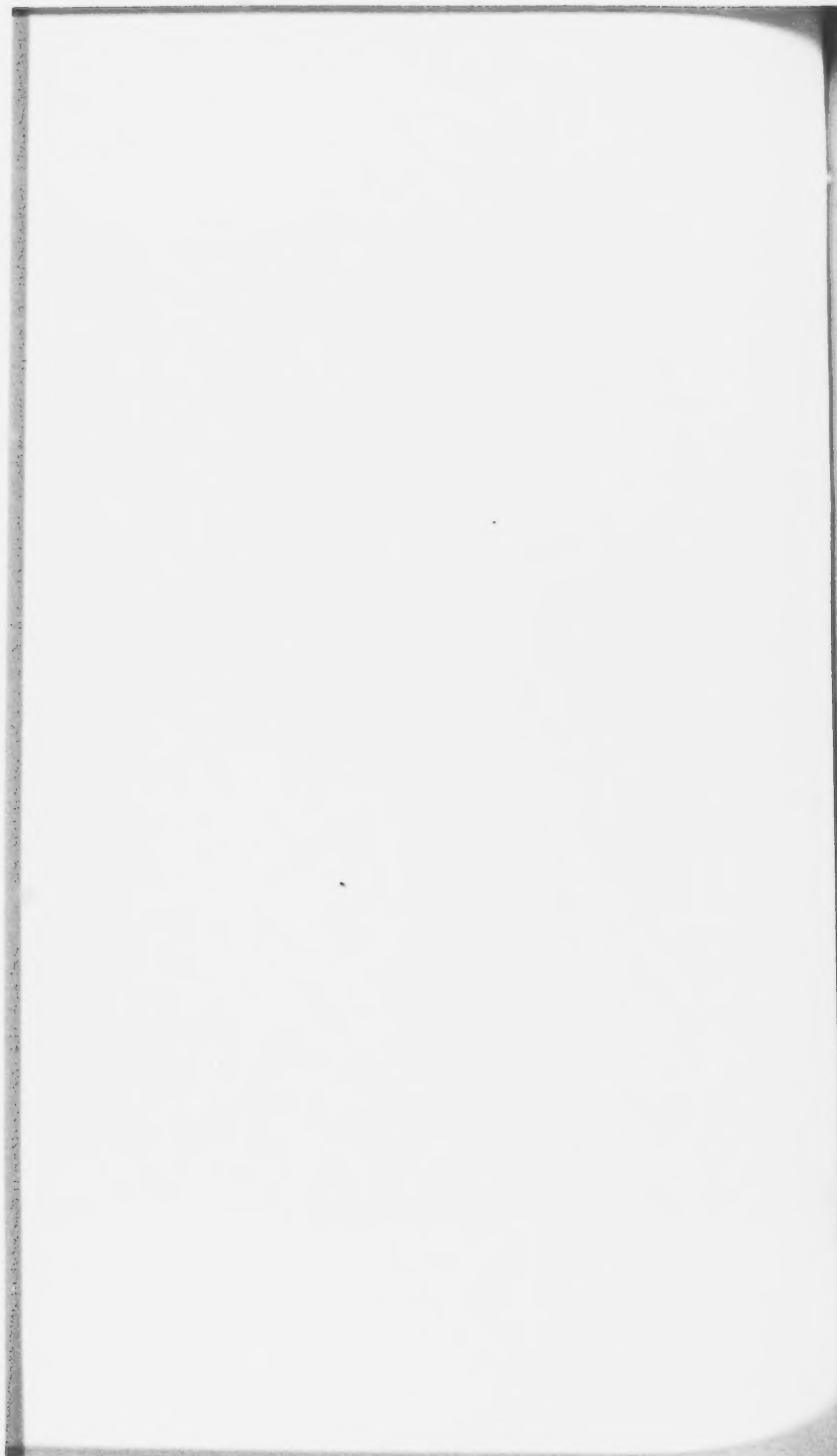


765=766

COPY BOUND VERTICALLY

5983





PHOTOGRAPH

Franklin Square, N. Y. _____ 195 _____

Received from **The Franklin National Bank**

OF FRANKLIN SQUARE

SAVINGS DEPARTMENT

AMOUNT _____ \$ _____ DOLLARS

Charge to Account No. _____

SIGNATURE _____

SAVINGS PASS BOOK MUST BE PRESENTED WITH THIS RECEIPT

CH 710128

SAVE REGULARLY FOR A RAINY DAY

Open An Account In Our Special Interest Department

We Pay **2%** on balances from \$100. to \$1000. and 1 1/2% on balances above \$1000. No limit on deposits or withdrawals.

The Franklin National Bank

ELMONT

FRANKLIN SQUARE

LEVITTOWN

Member Federal Deposit Insurance Corporation

[fol. 770]

PLAINTIFF'S EXHIBIT 33

Certificate of State Superintendent of Banks

State of New York Banking Department
Albany, New York

I Hereby Certify that I am the Superintendent of Banks of the State of New York, and that, as such, I am duly authorized and charged by the provisions of Sections 11 and 12 of the Banking Law of the State of New York, as amended, with the execution, administration and enforcement of the laws relating to the individuals, partnerships and corporations doing a banking business in the State of New York, and to supervise and regulate such banking business, in accordance with the provisions of the Banking Law of the State of New York; that as such Superintendent of Banks I have the custody and control of all records concerning the administration of the Banking Law of the State of New York; that I have made diligent and complete search of such records and do not find that The Franklin National Bank of Franklin Square, having its principal place of business at Franklin Square, Nassau County, State of New York, was ever authorized or empowered by the State of New York to do a savings bank business and/or a savings and loan association business in the State of New York.

Witness my hand and the seal of the Banking Department of the State of New York, at the City of Albany, this 30th day of October, 1950.

William A. Lyon, Superintendent of Banks.

[fol. 771]

Certificate for Certified Copy

Treasury Department,

Office of Comptroller of the Currency, ss:

I, J. L. Robertson, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete photostatic copy of the certificate of J. W. McIntosh, Comptroller of the Currency, dated October 13, 1926, authorizing "The Franklin Square National Bank", (Charter No. 12997), Franklin Square, New York, to commence the business of banking.

In Testimony Whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 3rd day of May, A. D. 1950.

J. L. Robertson, Acting Comptroller of the Currency
(Seal).

[fol. 772]

PLAINTIFF'S EXHIBIT 34

Certificate of Comptroller of the Currency

No. 12997

Treasury Department

Office of Comptroller of the Currency

Washington, D. C., October 13, 1926.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that "The Franklin Square National Bank" in the Village of Franklin Square in the County of Nassau and State of New York has complied with all the provisions of the Statutes of United States, required to be complied with before an association shall be authorized to commence the business of Banking;

Now, therefore, I, J. W. McIntosh, Comptroller of the Currency, do hereby certify that "The Franklin Square National Bank" in the Village of Franklin Square in the County of Nassau and State of New York is authorized to commence the business of Banking as provided in Section Fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

In witness whereof, witness my hand and seal of office this Thirteenth day of October, 1926.

J. W. McIntosh, Comptroller of the Currency.

[fol. 773]

PLAINTIFF'S EXHIBIT 35.

Certificate of Change of Name

Certificate for Certified Copy

Treasury Department,

Office of Comptroller of the Currency, ss:

I, J. L. Robertson, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete photostatic copy of the Certificate of J. L. Robertson, Acting Comptroller of the Currency, dated August 10, 1949, authorizing a change in title of "The Franklin Square National Bank", Franklin Square, New York, (Charter No. 12997), to "The Franklin National Bank of Franklin Square", effective August 15, 1949.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 3rd day of May, A. D. 1950.

J. L. Robertson, Acting Comptroller of the Currency
(Seal).

[fol. 774] Certificate of Change of Corporate Title

No. 12997.

Treasury Department

Office of the Comptroller of the Currency

Washington, D. C., August 10, 1949.

Whereas, satisfactory notice has been transmitted to the Comptroller of the Currency to the effect that all requisite legal and corporate action has been taken by "The Franklin Square National Bank," Franklin Square, New York, in accordance with the applicable provisions of the banking laws of the United States, to authorize a change of the title of that Association to "The Franklin National Bank of Franklin Square,"

Now, therefore, it is hereby certified, That such change of title is hereby authorized, to be effective August 15, 1949.

J. L. Robertson, Acting Comptroller of the Currency.

(Here follows 3 photographs, side folios 775, 775A, 776-
777)

602C

[fols. 776-777] DEFENDANT'S EXHIBIT A

Preliminary architect's drawing showing bank building
and proposed new wing.



*When it is possible to undertake commercial construction, the bank building
will be expanded by the additions of a new wing and an entire new upper floor
... with the resultant appearance indicated by the above architect's drawing.*

776=777

[fol. 778]

DEFENDANT'S EXHIBIT B

Architect's drawing showing layout of westerly addition to bank.

(Omitted pursuant to stipulation)

Brochure distributed by the defendant showing sketches of various portions of the bank and facilities offered to the public.

Dedicated to You

[fol. 780]

DEFENDANT'S EXHIBIT D

Form of questionnaire used in connection with poll survey.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT E

Form of questionnaire used in connection with poll survey.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT F

Form of questionnaire used in connection with poll survey.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT G

Form of questionnaire used in connection with poll survey.

[fol. 781]

DEFENDANT'S EXHIBIT H

Report of Bureau of Census, U. S. Department of Commerce, showing census figures for Nassau and other counties located in the State of New York.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT I

Aerial survey of Glen Cove.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT J

Aerial survey of Levittown.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT K

Map showing location of clusters in Nassau County.

(Omitted pursuant to stipulation)

[fol. 782]

DEFENDANT'S EXHIBIT L

Street and road map of Nassau County.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT M

Tippett's random sample numbers—Table V, VI, XVII and XVIII.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT N

Tippett's table of random sampling numbers.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT O

Array sheets—urban population (adding machine tape).

(Omitted pursuant to stipulation)

[fol. 783]

DEFENDANT'S EXHIBIT P

List of clusters for Glen Cove.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT Q

Pre-listing sheets for Cluster No. 15.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT R

Array sheet for unincorporated areas.

(Omitted pursuant to stipulation)

(Here follow 2 photographs, side folios 784-785, 785a)

624A

[fols. 784-785] DEFENDANT'S EXHIBIT S

First two pages of facing sheets attached to questionnaire.

City _____ Location # _____

Street address _____

Apartment number (identification) _____

We are making a survey for the Psychological Workshop at Hofstra College. Would you kindly tell me how many persons there are in your family 21 years of age and over _____

List all adults in household

First call				2nd call				3rd call				4th call				5th call			
I	N	R		I	N	R		I	N	R		I	N	R		I	N	R	

1																			
2																			
3																			
4																			
5																			
6																			
7																			
8																			
9																			
10																			
No one at home																			
Refused at door																			

List each adult (21 and over) on a separate line. List the men of the house first. Then the lady of the house. Then list all other Males in the order of age from oldest to youngest. Then list all other females in the order of age from oldest to youngest.

624B

The Psychological Workshop
Hofstra College

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is?

Service	Description of service
Checking account	Don't know _____
Compound interest account	Don't know _____
Thrift account	Don't know _____
Savings account	Don't know _____
Special interest account	Don't know _____

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

Service	Bank offering
Checking account	Don't know _____
Compound interest account	Don't know _____
Thrift account	Don't know _____
Savings account	Don't know _____
Special interest account	Don't know _____

3. When you want to deposit money to earn interest, which of these accounts do you prefer to open?

Account preferred _____

3a. In what type of financial institution do you prefer to open such an account?

Institution preferred _____

Name _____

Sex

Male _____

Female _____

Approx. Age

Address _____

Date _____

Interviewers
signature _____

[fol. 786] DEFENDANT'S EXHIBIT T

928 questionnaires.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT U

22 sets of pre-listing sheets.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT V

Computations showing Federal and State income taxes.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT W FOR IDENTIFICATION

Regulation Q of the Federal Reserve Bank of New York.

(Omitted pursuant to stipulation)

[fol. 787] DEFENDANT'S EXHIBIT X FOR IDENTIFICATION

Regulation D of the Board of Governors of the Federal Reserve System.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT Y

U. S. Savings Bond poster.

(Omitted pursuant to stipulation)

DEFENDANT'S EXHIBIT Z

Calculation sheets of Professor Brumbach (22 pages).
(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT AA

The definitions used in connection with the Hofstra Survey.
(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT BB

Classified response lists.
(Omitted pursuant to stipulation.)

[fol. 788]

DEFENDANT'S EXHIBIT CC

Table I

Description of Accounts
Total—Men and Women

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account	Compound Interest Account	Special Interest Account	Thrift Account
	%	%	%	%
Persons saying "I don't know"	7.2	53.3	62.7	52.7
Persons making inaccurate statements .	2.9	5.4	14.1	25.1
Persons making indefinite statements . .	4.1	0.5	1.8	2.7
Persons making accurate statements . . .	85.8	34.2	14.5	7.8
Persons saying "It is the same as a sav- ings account"	—	6.6	6.9	11.7
	100.0	100.0	100.0	100.0
Number answering	927	925	924	927

[fol. 789]

Table II
Description of Accounts
Total—Men

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Men saying "I don't know".....	5.7	40.2	52.7	42.8
Men making inaccurate statements....	4.4	6.0	18.7	32.6
Men making indefinite statements....	4.6	0.5	1.7	2.2
Men making accurate statements....	85.3	44.3	18.2	8.9
Men saying "It is the same as a savings account".....	—	9.0	8.7	13.5
	100.0	100.0	100.0	100.0
Number answering.....	406	403	402	406

[fol. 790]

Table III
Description of Accounts
Total—Women

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Women saying "I don't know".....	8.3	63.6	70.3	60.6
Women making inaccurate statements..	1.7	5.0	10.5	19.0
Women making indefinite statements...	3.5	0.6	1.9	3.1
Women making accurate statements...	86.5	26.0	11.7	6.9
Women saying "It is the same as a sav- ings account".....	—	4.8	5.6	10.4
	100.0	100.0	100.0	100.0
Number answering.....	521	522	522	520

[fol. 791]

Table IV

Description of Accounts
Total—Men and Women *
Age 21-29

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Persons saying "I don't know"	1.7	57.5	70.9	57.5
Persons making inaccurate statements	3.8	5.6	7.8	21.3
Persons making indefinite statements	3.4	0.6	2.8	3.9
Persons making accurate statements	91.1	32.9	13.5	9.5
Persons saying "It is the same as a savings account"	—	3.4	5.0	7.8
	100.0	100.0	100.0	100.0
Number answering	179			

* No age data obtained for 12 respondents.

[fol. 792]

Table V

Description of Accounts
Total—Men and Women
Age 30-44

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Persons saying "I don't know"	6.1	53.1	62.5	50.1
Persons making inaccurate statements . .	1.5	5.5	13.8	27.6
Persons making indefinite statements . .	3.4	0.8	1.5	1.5
Persons making accurate statements . . .	89.0	33.6	13.9	8.0
Persons saying "It is the same as a sav- ings account"	—	7.0	8.3	12.8
	100.0	100.0	100.0	100.0
Number answering	398			

[fol. 793]

Table VI

Description of Accounts
Total—Men and Women
Age 45 and Over

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Persons saying "I don't know"	10.9	52.2	58.5	54.1
Persons making inaccurate statements . .	3.9	5.4	17.5	22.8
Persons making indefinite statements . .	5.9	—	1.8	3.6
Persons making accurate statements . . .	79.3	35.6	15.7	6.8
Persons saying "It is the same as a sav- ings account"	—	6.8	6.5	12.7
	100.0	100.0	100.0	100.0
Number answering	338			

[fol. 794]

Table VII

Financial Institutions Said to Offer Accounts
Total—Men and Women

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial insti-

tutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	51.3	24.1	16.7	26.7
Any or All Banks.....	17.7	8.0	9.7	8.5
Commercial Banks.....	3.6	5.3	7.9	4.8
Business Bank.....	0.7	3.0	3.9	1.1
Regular Bank.....	1.1	0.5	0.4	0.4
Ordinary Bank.....	0.4	0.1	—	0.2
General Bank.....	0.1	—	0.3	0.1
National Bank.....	7.0	5.1	6.1	4.3
Federal Bank.....	3.4	2.8	3.2	1.4
Local Bank.....	1.4	0.8	1.1	1.2
Savings and Loan Assn.....	4.5	2.8	3.4	2.6
Trust.....	4.2	2.7	3.7	2.2
Miscellaneous.....	6.1	3.5	4.7	5.9
Don't Know.....	10.5	48.2	46.0	50.1
	112.0	106.9	107.1	109.5
Number answering.....	927	925	924	927

[fol. 795]

Table VIII

Financial Institutions Said to Offer Accounts
Total—Men

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	52.3	29.2	17.1	26.7
Any or All Banks.....	19.3	7.8	11.1	8.5
Commercial Banks.....	4.2	6.3	10.6	4.8
Business Bank.....	0.7	2.3	3.3	1.1
Regular Bank.....	1.0	0.5	0.3	0.4
Ordinary Bank.....	0.7	0.3	—	0.2
General Bank.....	0.2	—	0.3	0.1
National Bank.....	6.2	6.5	6.5	4.3
Federal Bank.....	2.2	1.7	2.3	1.4
Local Bank.....	1.0	0.3	1.3	1.2
Savings and Loan Assn.....	4.0	2.8	3.3	2.6
Trust.....	3.0	2.8	4.3	2.2
Miscellaneous.....	2.7	2.8	4.8	5.9
Don't Know.....	6.2	38.1	38.3	50.1
	103.7	101.4	103.5	105.2
Number answering.....	406	403	402	406

[fol. 796]

Table IX

Financial Institutions Said to Offer Accounts
Total—Women

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	50.5	19.9	16.4	26.6
Any or All Banks.....	16.5	8.1	8.7	7.5
Commercial Bank.....	3.1	4.4	5.0	3.4
Business Bank.....	0.6	3.4	4.4	0.9
Regular Bank.....	1.2	0.6	0.6	0.6
Ordinary Bank.....	0.2	—	—	—
General Bank.....	—	—	0.4	—
National Bank.....	7.6	4.0	5.8	4.1
Federal Bank.....	4.3	3.6	3.8	1.7
Local Bank.....	1.8	1.1	1.0	1.1
Savings and Loan Assn.....	4.9	2.9	3.5	2.4
Trust.....	5.1	2.7	3.3	1.9
Miscellaneous.....	8.8	4.0	4.6	6.7
Don't Know.....	13.0	55.2	51.7	55.5
	<hr/> 117.6	<hr/> 109.9	<hr/> 109.2	<hr/> 112.4
Number answering.....	521	522	522	521

[fol. 797]

Table X

Financial Institutions Said to Offer Accounts
Total—Men and Women
Age 21-28

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	48.4	18.9	16.8	25.1
Any or All Banks.....	24.6	9.5	10.1	7.8
Commercial Bank.....	2.8	4.5	6.2	0.6
Business Bank.....	0.6	3.9	3.4	1.1
Regular Bank.....	—	0.6	—	—
Ordinary Bank.....	—	0.6	—	0.6
General Bank.....	—	—	—	—
National Bank.....	3.9	5.6	4.5	1.7
Federal Bank.....	4.5	1.7	2.8	1.7
Local Bank.....	1.1	0.6	1.1	0.6
Savings and Loan Assn.....	4.5	4.5	4.5	2.8
Trust.....	3.4	2.8	3.4	1.1
Miscellaneous.....	5.6	3.9	5.0	5.6
Don't Know.....	7.8	47.5	47.5	52.5
	107.2	104.6	105.3	101.2
Number answering.....	179			

[fol. 798]

Table XI

Financial Institutions Said to Offer Accounts
Total—Men and Women
Age 30-44

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	53.7	25.1	17.3	26.3
Any or All Banks.....	19.3	6.8	5.3	9.5
Commercial Bank.....	3.3	6.8	7.8	4.5
Business Bank.....	0.3	3.5	4.0	1.0
Regular Bank.....	1.8	1.8	0.8	0.5
Ordinary Bank.....	0.5	—	—	—
General Bank.....	—	—	—	—
National Bank.....	6.8	6.0	5.5	5.3
Federal Bank.....	3.5	4.3	3.5	1.5
Local Bank.....	1.5	0.8	1.5	1.5
Savings and Loan Assn.....	4.3	2.5	3.0	1.5
Trust.....	4.8	3.3	5.3	2.5
Miscellaneous.....	5.3	2.3	3.0	4.8
Don't Know.....	8.3	44.9	43.1	45.1
	114.9	104.0	100.1	107.1
Number answering.....	398			

[fol. 799]

Table XII

Financial Institutions Said to Offer Accounts
Total—Men and Women
Age 45 and Over

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	50.0	25.5	15.9	27.5
Any or All Banks.....	12.1	8.6	8.6	7.7
Commercial Bank.....	4.4	3.9	7.7	7.4
Business Bank.....	1.2	1.8	4.1	1.2
Regular Bank.....	0.9	0.3	0.3	0.6
Ordinary Bank.....	0.6	0.3	—	—
General Bank.....	0.3	—	0.9	0.3
National Bank.....	8.9	4.2	7.7	4.4
Federal Bank.....	2.7	1.8	2.9	0.9
Local Bank.....	1.5	0.9	0.9	1.2
Savings and Loan Assn.....	5.0	2.4	3.3	3.9
Trust.....	3.9	2.1	2.1	2.4
Miscellaneous.....	7.4	4.7	6.5	7.4
Don't Know.....	13.3	54.8	48.5	52.1
	112.2	108.3	109.4	120.0
Number answering.....	338			

[fol. 800]

Table XIII

Account Preferred
Total—Men and Women

3. When you want to deposit money to earn interest,
which of these accounts do you prefer to open?

Account	Percent Naming Each Account %
Savings Account	57.7
Compound Interest Account	21.9
Special Interest Account	10.7
Thrift Account	1.2
Checking Account	0.6
Don't Know	6.8
Miscellaneous	1.1
	<hr/>
	100.0
Number answering	927

[fol. 801]

Table XIV

Account Preferred
Total—Men

3. When you want to deposit money to earn interest,
which of these accounts do you prefer to open?

Account	Percent Naming Each Account %
Savings Account	55.3
Compound Interest Account	29.4
Special Interest Account	8.7
Thrift Account	0.8
Checking Account	0.8
Don't Know	3.7
Miscellaneous	1.3
	<hr/>
	100.0
Number answering	406

[fol. 802]

Table XV
Account Preferred
Total—Women

3. When you want to deposit money to earn interest,
which of these accounts do you prefer to open?

Account	Percent Naming Each Account %
Savings Account	58.7
Compound Interest Account	17.0
Special Interest Account	12.1
Thrift Account	1.6
Checking Account	0.6
Don't Know	9.0
Miscellaneous	1.0
	<hr/>
	100.0
Number answering	521

[fol. 803]

Table XVI
Account Preferred
Total—Men and Women
Age 21-29

3. When you want to deposit money to earn interest,
which of these accounts do you prefer to open?

Account	Percent Naming Each Account %
Savings Account	53.0
Compound Interest Account	27.8
Special Interest Account	14.1
Thrift Account	1.2
Checking Account	0.6
Don't Know	2.1
Miscellaneous	1.2
	<hr/>
	100.0
Number answering	179

[fol. 804]

Table XVII

Account Preferred
Total—Men and Women
Age 30-44

3. When you want to deposit money to earn interest,
which of these accounts do you prefer to open?

Account	Percent Naming Each Account %
Savings Account	58.2
Compound Interest Account	23.7
Special Interest Account	11.6
Thrift Account	0.9
Checking Account	0.2
Don't Know	4.9
Miscellaneous	0.5
	<hr/>
	100.0
Number answering	398

[fol. 805]

Table XVIII

Account Preferred
Total—Men and Women
Age 45 and Over

3. When you want to deposit money to earn interest,
which of these accounts do you prefer to open?

Account	Percent Naming Each Account %
Savings Account	59.5
Compound Interest Account	17.0
Special Interest Account	7.6
Thrift Account	1.5
Checking Account	1.2
Don't Know	11.4
Miscellaneous	1.8
	<hr/>
	100.0
Number answering	338

fol. 806]

Table XIX

Bank Preferred for Savings Account
Total—Men and Women

Savings Account

3a. In what type of financial institution do you prefer
to open such an account? Where respondents would prefer
to go for a Savings Account.

Institution	Percent Naming Savings Account %
Savings Bank	53.4
Any or All Banks	5.7
Commercial Bank	2.2
Business Bank	0.9
Regular Bank	1.6
National Bank	8.9
Federal Bank	4.3
Savings and Loan Assn.	5.4
Trust Company	3.8
Miscellaneous	9.9
No Preference	0.5
Don't Know	3.4
	<hr/>
	100.0
Number answering	558

[fol. 807]

Table XX

Bank Preferred for Compound Interest Account
Total—Men and Women

Compound Interest Account

3a. In what type of financial institution do you prefer to open such an account? Where respondents would prefer to go for a Compound Interest Account.

Institution	Percent Naming Compound Interest Account %
Savings Bank	39.5
Any or All Banks	8.3
Commercial Bank	7.9
Business Bank	2.3
Regular Bank	1.4
National Bank	5.6
Federal Bank	4.2
Savings and Loan Assn.	10.2
Trust Company	3.3
Miscellaneous	10.7
No Preference	1.9
Don't Know	4.7
	<hr/>
	100.0
Number answering	215

[fol. 808]

Table XXI

Bank Preferred for Special Interest Account
Total—Men and Women

Special Interest Account

3a. In what type of financial institution do you prefer to open such an account? Where respondents would prefer to go for a Special Interest Account.

Institution	Percent Naming Special Interest Account %
Savings Bank	29.8
Any or All Banks	12.5
Commercial Bank	3.8
Business Bank	1.9
Regular Bank	2.9
National Bank	7.7
Federal Bank	5.8
Savings and Loan Assn.	9.6
Trust Company	10.6
Miscellaneous	4.8
No Preference	3.8
Don't Know	6.7
	<hr/>
	100.0
Number answering	104

[fol. 809]

DEFENDANT'S EXHIBIT DD

Weighted Results—Three Tables

The sample used in this study contained 406 men and 522 women.

Actually the population at Nassau County is about 49% male and 51% female.

The results for men and for women were so similar that it was apparent that no weighting at the obtained figures

was necessary because the weighted results would not be substantially different from the unweighted.

In order to substantiate this belief and demonstrate its validity to the Court, we have calculated results (for 49% male and 51% female) weighted to represent men and women exactly. The weighted figures are given in *italic* beside the corresponding unweighted figures which are *unin.* . . .

Of the 83 figures reported in these 3 tables (not including total "percents") only the four figures in brackets vary from the weighted result by more than 1%. The largest variation is 2.8% (Table VII, "Thrift Account column", "Don't Know", row).

[fol. 810]

Table I

Description of Accounts
Total—Men and Women

We are making a survey of some of the services offered and advertised by financial institutions. By financial institutions we mean banks of all types and savings and loan associations.

1. Will you please describe what each of the following services is.

	Savings Account %		Compound Interest Account %		Special Interest Account %		Thrift Account %	
Persons saying "I don't know"	7.2	7.1	53.3	52.3	62.7	61.8	52.7	52.1
Persons making inaccurate statements	2.9	3.0	5.4	5.5	14.1	14.5	25.1	25.6
Persons making indefinite statements	4.1	4.0	0.5	.6	1.8	1.8	2.7	2.7
Persons making accurate statements	85.8	85.9	34.2	34.8	14.5	14.8	7.8	7.7
Persons saying "It is the same as a savings account"	—		6.6	6.8	6.9	7.2	11.7	11.9
	100.0		100.0		100.0		100.0	
Number answering	927		925		924		927	

[fol. 811]

Table VII

Financial Institutions Said to Offer Accounts
Total—Men and Women

2. Will you please state what kind or kinds of financial institutions offer each of these services. By financial institutions we mean banks of all types and savings and loan associations.

	Savings Account %	Compound Interest Account %	Special Interest Account %	Thrift Account %
Savings Bank.....	[51.3 51.4]	24.1 24.4	16.7 16.7	26.7 26.7
Any or All Banks.....	17.7 17.9	8.0 8.0	9.7 9.9	8.5 8.0
Commercial Banks.....	3.6 3.6	5.3 5.3	7.9 7.7	4.8 4.1
Business Bank.....	0.7 .7	3.0 2.9	3.9 3.9	1.1 1.0
Regular Bank.....	1.1 1.1	0.5 .6	0.4 .5	0.4 .5
Ordinary Bank.....	0.4 .4	0.1 .1	— .0	0.2 .10
General Bank.....	0.1 0.1	— .0	0.3 .4	0.1 .1
National Bank.....	7.0 6.9	5.1 5.2	6.1 6.1	4.3 4.2
Federal Bank.....	3.4 3.3	2.8 2.7	3.2 3.1	1.4 1.6
Local Bank.....	1.4 1.5	0.8 .7	1.1 1.2	1.2 1.2
Savings and Loan Assn..	4.5 4.5	2.8 2.9	3.4 3.4	2.6 2.5
Trust.....	4.2 4.1	2.7 2.8	3.7 3.8	2.2 2.0
Miscellaneous.....	6.1 5.9	3.5 3.4	4.7 4.7	5.9 6.3
Don't Know.....	10.5 9.7	[48.2 47.0]	46.0 45.2	[50.1 52.9]
	112.0	106.9	107.1	109.5
Number answering.....	927	925	924	927

[fol. 812]

Table XIII

Account Preferred
Total—Men and Women

3. When you want to deposit money to earn interest, which of these accounts do you prefer to open?

Account	Percent Naming Each Account	
	%	%
Savings Account	57.7	57.1
Compound Interest Account	21.9	23.0
Special Interest Account	10.7	10.5
Thrift Account	1.2	1.2
Checking Account	0.6	.7
Don't Know	6.8	6.4
Miscellaneous	1.1	1.2
	100.0	
Number answering	927	

DEFENDANT'S EXHIBIT EE
(In Part)
Typical bank advertisements

(Here follow 4 Photolithographs, side folios 813, 813a, 813b,
813c)

642A

THE NEW YORK TIMES, FRIDAY, JANUARY 5, 1951.

INCOME
ACCOUNTS

3%

PER ANNUM

**CURRENT RATE
TWICE YEARLY
JAN. 1st & JULY 1st**

**BY ACT OF CONGRESS
F.S.L.I.
INSURED up to \$10,000**

1 SAVINGS
AND LOAN ASSOCIATION
EAST PATENSON, N. J.

813

642B

THE NEW YORK TIMES, TUESDAY, JANUARY 2, 1951.



3%
CURRENT DIVIDEND



Do You Know?

ALL
INVESTMENTS
INSURED
UP TO
\$10,000.00

Open a savings account in **LAWN SAVINGS**

- Accounts opened before January 15th will receive full dividend credit for the month of January.
- **NEVER LESS THAN 3%**—for the past 28 years?
- Appropriate Investments for Pension Funds ... Perpetual Care Funds ... Legal Trust Funds ... Corporate and Individual Accounts?
- You can save any amount at any time and withdraw at your convenience?

LAWN

SAVINGS and LOAN ASSOCIATION

Resources over \$21,000,000

Ample surplus and reserves

3525 W. 63rd St., Chicago 29, Ill.
WAlbrook 5-6500

Member Cook County Council of
Savings and Loan Associations

LAWN SAVINGS

3525 W. 63rd St., Chicago 29, Ill.

Gentlemen:

Enclosed find \$_____ (send check for at least \$25.00). Open an account in following name(s)

☐ Just send Free Booklet.

NAME _____

ADDRESS _____

TEL. _____


CITY _____ STATE _____

THE NEW YORK TIMES,
SATURDAY, DECEMBER 30, 1950.

3⁰⁰ ON YOUR SAVINGS

- 3% interest per annum will be paid June 30, 1951
- Each account insured to \$10,000
- Send for once-by-mail plan

Great Western Savings
AND LOAN ASSOCIATION
706 South Hill St. • Los Angeles, Calif.



HIGHER
DIVIDENDS
on Savings

now paying
2 1/4%
per annum
BONUS ACCOUNTS EARN
UP TO 1% EXTRA
Send for
Bonus Booklet C

SAVINGS
INSURED
up to
\$10,000

Start now...

Savings received by
the 10th earn divi-
dends from the 1st

"SAVE-BY-MAIL"
FORMS FREE

Hours: Daily, 9 to 3
Mondays to 6 P.M.



WEST SIDE
FEDERAL SAVINGS

and Loan Association

250 W. 57th St., at E'way
New York 19, N. Y.
Circle 7-3333



A THRIFT INSTITUTION SINCE 1892

184 Consecutive
INTEREST DIVIDEND
declared for 6 months ending Dec. 31, 1950

net rate of **2%** per annum

Deposits on or before Jan. 15
draw interest from the first

BUSHWICK
SAVINGS BANK

GRAND ST. AT GRAMM AVE., ELYRIA, N. Y.
Member Federal Deposit Insurance Corp.
Banking By Mail

3 1/2%
PER ANNUM
PAID ON
SAVINGS
IN CALIFORNIA

SAVE BY MAIL

★ Each account insured
to \$10,000 by the Fed-
eral Savings and Loan
Insurance Corporation

★ Full earnings paid
from the 1st on all
accounts opened
by the 15th

UNITED SAVINGS
AND LOAN ASSOCIATION
NEW WESTERN NATIONAL BLDG.
SAN FRANCISCO 4, CALIF.

[fol. 814] DEFENDANT'S EXHIBIT FF FOR IDENTIFICATION

Annual report of defendant for the year 1946

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT GG FOR IDENTIFICATION

Article appearing in July, 1947 issue of Banking Magazine regarding defendant bank.

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT HH FOR IDENTIFICATION

Article appearing in Magazine Digest regarding defendant bank.

(Omitted pursuant to stipulation.)

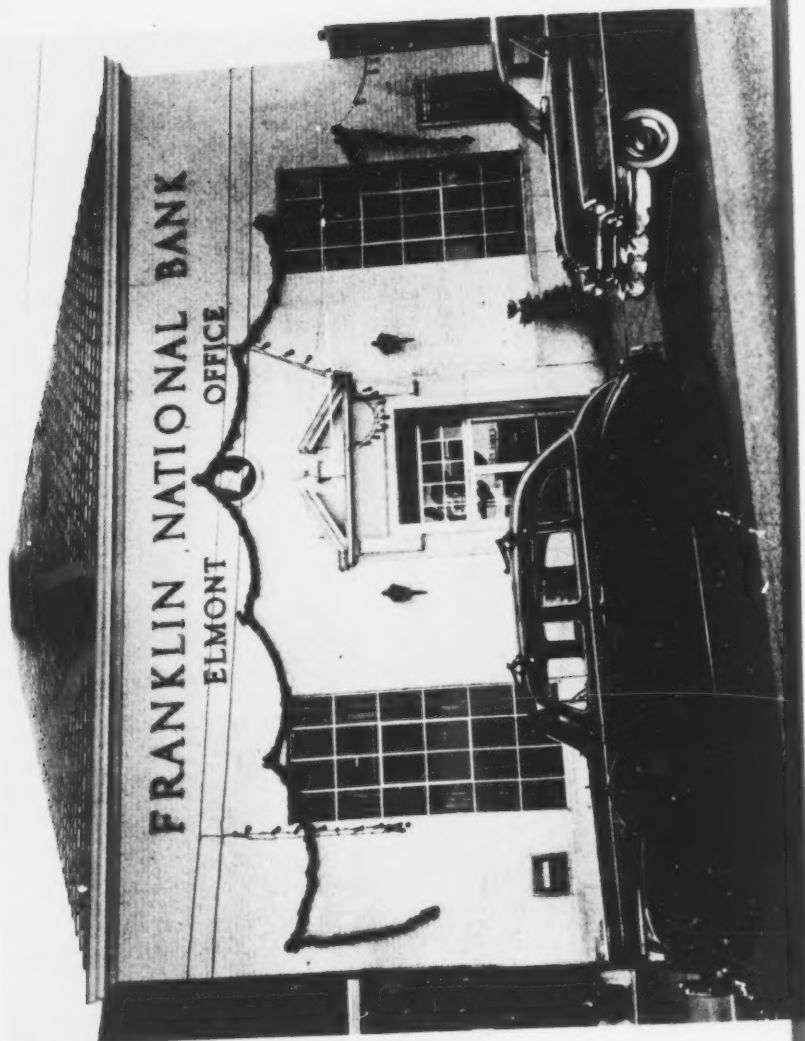
DEFENDANT'S EXHIBIT II FOR IDENTIFICATION

Article appearing in February, 1945 edition of Readers Digest regarding defendant bank.

(Omitted pursuant to stipulation.)

(Here follows 1 Photo, folio 815)

G44A





[fol. 816] DEFENDANT'S EXHIBIT KK

Photograph of Levittown Branch of defendant bank.

[OVER]

(Here follows 1 Photo, folio 817)



646A



[fol. 818]

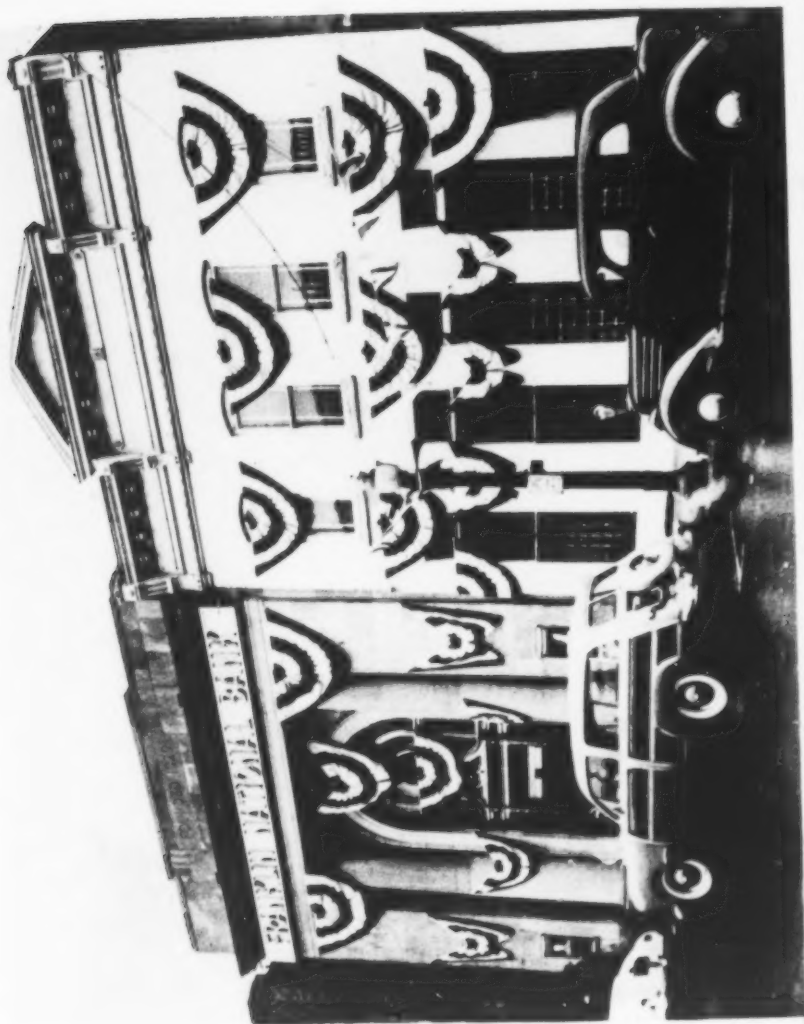
DEFENDANT'S EXHIBIT LL

Photograph of Rockville Centre Branch of defendant bank.

[OVER]

(Here follows 1 Photo, folio 819)

G48A



[fol. 820]

DEFENDANT'S EXHIBIT MM

Franklin National Bank of Franklin Square
Growth of Demand and Savings Deposits

Date (As of December 31)	Total Demand Deposits (Checking Accounts)	Total Savings Deposits (Pass Book Accounts)
1941.....	\$ 1,486,093.30	\$ 2,274,601.72
1942.....	2,010,887.48	2,959,368.10
1943.....	3,260,435.09	5,005,205.76
1944.....	4,236,252.03	7,423,059.97
1945.....	6,344,384.54	9,493,496.55
1946.....	7,993,836.35	10,085,748.68
1947.....	9,772,318.40	11,920,613.26
1948.....	12,859,556.67	13,691,526.93
1949.....	19,141,083.57	14,928,962.12
May 29, 1950.....	22,285,828.45	15,793,225.33
Jan. 29, 1951.....	34,771,246.75	25,240,370.31

[fol. 821]

DEFENDANT'S EXHIBIT NN

SUPREME COURT OF THE STATE OF NEW YORK, NASSAU
COUNTYTHE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
againstTHE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant.

STIPULATION

It is hereby stipulated by and between the attorneys for the parties in the above-entitled matter:

(a) that the statistical data annexed hereto as Exhibit A, is authentic and correct;

(b) that the same may be introduced in evidence by presentation to this Court of this stipulation with like force and effect as if witnesses competent to testify as to the accuracy and authenticity of the same had been called and had testified at the trial in this proceeding; and

(c) that the Attorney General hereby expressly reserves his right to object to the introduction in evidence of the statistical data hereto annexed upon the ground that such [fol. 822] statistical data is irrelevant or immaterial, or

both, all objections to the competency of the same being waived hereby.

Dated: New York City, New York,

January 15, 1951.

Nathaniel L. Goldstein, Attorney General of the
State of New York.

By (illegible) Attorney for Plaintiffs.

Alley, Cole, Grimes & Friedman, Attorney for Defendant.

EXHIBIT A

(a) Tabulation of Deposits of the Banks of Nassau County for the past five years.

(As of December 31)

All Deposits

(In thousands of dollars)

	All Natl Banks	All State Banks	All Commercial Banks	Savings Banks
1945.....	215,406	162,002	377,408	17,245
1946.....	220,336	162,842	383,178	20,541
1947.....	234,524	166,578	401,102	21,303
1948.....	250,374	174,213	424,587	21,934
1949.....	277,779	182,349	460,128	23,776

[fol. 823]

Time Deposits

1945.....	98,518	69,176	167,694	17,245
1946.....	111,871	75,663	187,534	20,541
1947.....	116,658	76,195	192,853	21,303
1948.....	120,237	76,501	196,738	21,934
1949.....	124,798	76,152	200,950	23,776

Demand Deposits

1945.....	116,888	92,826	209,714	
1946.....	108,465	87,179	195,644	
1947.....	117,866	90,383	208,249	
1948.....	130,137	97,712	227,849	
1949.....	152,981	106,197	259,178	

(b) Summary of Assets and Deposits of State Institutions as of Report Date Nearest to January 1st of Each Year shown

(New York State Complete)

(In thousands of dollars)

Date	Savings Banks			Banks		
	Assets	Deposits	No.	Assets	Deposits	No.
1946.....	\$ 9,171,941	\$ 8,292,000	131	\$489,399	\$457,798	122
1947.....	10,169,105	9,169,759	131	487,404	452,066	115
1948.....	10,882,519	9,814,535	131	479,735	442,251	114
1949.....	11,485,380	10,340,190	131	465,953	427,847	110
1950.....	12,326,940	11,102,297	130	424,417	387,468	108

[col. 824]

Trust Companies

	Assets	Deposits	No.
1946.....	\$23,679,337	\$21,748,068	150
1947.....	19,778,233	17,882,870	146
1948.....	20,197,291	18,278,336	141
1949.....	19,722,872	17,699,319	138
1950.....	19,926,706	17,899,216	136

(c) Summary of Assets and Amounts Due Shareholders of New York State Savings & Loan Associations as of Report Date Nearest to January 1st of Each Year Shown.

(In thousands of dollars)

Savings and Loan Associations

Date	Assets	Amount Due Shareholders	No.
1946.....	\$384,108	\$334,470	175
1947.....	433,525	381,926	172
1948.....	487,890	426,281	172
1949.....	536,889	471,048	171
1950.....	583,145	514,096	171

(d) Tabulation of Total Assets of all Federal Savings & Loan Associations in the State of New York for the Years 1944 through 1949

(As of December 31)

Year	Total Assets
1944	\$275,934,000
1945	344,740,000
1946	425,283,000
1947	508,055,000
1948	610,776,000
1949	691,283,000

[fol. 825] (e) Tabulation of Deposits of all National Banks in the State of New York for the Years 1945 through 1949

(As of December 31)

(In thousands of dollars)

Year	Total Demand Deposits	Total Time Deposits	No.
1945.....	\$13,009,744	\$1,413,759	399
1946.....	10,601,992	1,629,764	392
1947.....	10,758,126	1,632,590	389
1948.....	10,141,182	1,723,345	386
1949.....	10,332,772	1,812,125	382

DEFENDANT'S EXHIBIT OO FOR IDENTIFICATION

Opinion of Comptroller of the Currency, dated July 10, 1939, regarding the right of National Bank to use the word savings.

(Omitted pursuant to stipulation)

[fol. 826]

DEFENDANT'S EXHIBIT PP

Form 2129-1 of the Treasury Department, Office of Comptroller of the Currency.

(Here Follow 2 Photolithographs, side folios 827, 827a)

On the ended December 31, 1929

BLURRED COPY

652B

Section B.—UNDIVIDED PROFITS ACCOUNT

	Six months ended December 31	Year ended December 31
9. UNDIVIDED PROFITS AT BEGINNING OF PERIOD.....	\$ 27 860 18	\$ 25 395 76
10. NET PROFITS FOR CURRENT PERIOD..... (Same as item 9 of this report, if a loss, show in red)	300 751 89	273 287 73
11. CREDITS TO UNDIVIDED PROFITS RESULTING FROM:		
(a) Withdrawals from reserve for dividends payable in common stock.....	NONE	NONE
(b) Withdrawals from reserves for other undeclared dividends.....	NONE	NONE
(c) Withdrawals from retirement account for preferred stock.....	NONE	NONE
(d) Withdrawals from reserves for contingencies, etc.....	NONE	NONE
(e) Withdrawals from surplus account.....	NONE	NONE
(f) Consolidation with South Shore Trust Co. (Reduction of capital stock not repaid to shareholders).....	37 000 00	37 000 00
(g) Assessments paid for impaired capital stock.....	NONE	NONE
(h) Voluntary contributions to surplus or profits.....	1 234 285 02	1 234 285 02
(i) Total.....	1 271 285 02	1 271 285 02
12. TOTAL, Item 9 plus items 10 and 11i.....	1 549 096 49	1 549 096 49
13. DEDUCTIONS FROM UNDIVIDED PROFITS RESULTING FROM:		
(a) Transfers to reserve for dividends payable in common stock.....	NONE	NONE
(b) Transfers to reserves for other undeclared dividends.....	NONE	NONE
(c) Transfers to retirement account for preferred stock.....	NONE	NONE
(d) Transfers to reserves for contingencies, etc.....	NONE	NONE
(e) Transfers to surplus account.....	1 008 000 00	1 200 000 00
(f) Cash dividends declared on common stock.....	NONE	NONE
(g) Transfers to common capital stock (stock dividends declared).....	27 000 00	87 000 00
(h) Dividends declared on class A preferred stock.....	NONE	NONE
(i) Dividends declared on class B preferred stock.....	NONE	NONE
(j) Total.....	1 027 000 00	1 287 000 00
14. UNDIVIDED PROFITS AT END OF PERIOD..... (Item 12 minus item 13j)	522 096 49	262 096 49

Section C.—TOTAL CREDITS TO PROFITS SINCE ORGANIZATION AND DISPOSITION OF PROFITS
(Please see that this section balances)

15. Surplus at end of period.....	\$ 3 000 000 00				
16. Undivided profits at end of period..... (Same as item 14 above)	522 096 49				
17. Reserves:					
(a) Reserve for dividends payable in common stock.....	NONE				
(b) Reserve for other undeclared dividends.....	NONE				
(c) Retirement account for preferred stock.....	NONE				
(d) Reserves for contingencies, etc.....	NONE				
TOTAL, \$..... (Items 15a & 16j inclusive)	3 522 096 49				
18. (a) Total dividends declared on common stock.....	560 500 00				
(b) Total dividends declared on class A preferred stock.....	25 863 31				
(c) Total dividends declared on class B preferred stock.....	15 537 60				
Total.....	601 899 91				
19. Net profits as national bank since organization..... (Add item 10, column 1, of this report to item 10 of last report on Form 2000)		\$ 2 300 830 36			
20. Reduction of capital stock not repaid to shareholders at the time of reduction.....		87 000 00			
21. Assessments paid for impaired capital stock.....		NONE			
22. Voluntary contributions to surplus or profits.....		2 300 999 02			
23. Profits and surplus of old organization at date of conversion to national system.....		NONE			
Total.....		601 899 91			

Section D.—RESERVE FOR BAD DEBTS AND OTHER VALUATION RESERVES
(See note on face other)

	RESERVE FOR BAD DEBT LOANS OR LOANS			OTHER VALUATION RESERVES ON LOANS AND SECURITIES (See note on face side)			
				Loans		Securities	
24. Balance at beginning of calendar year.....	\$.	520	207	98	\$.	NONE	NONE
25. Recoveries credited to these reserves.....		8	835	73		NONE	NONE
26. Transfers to these reserves (Included in item 5).....		213	343	69		NONE	NONE
27. Total (Sum of items 24, 25 and 26).....		742	387	40		NONE	NONE
28. Loans charged to these reserves.....		42	387	40		NONE	NONE
29. Transfers from these reserves (Included in item 4).....			NONE			NONE	NONE
30. Balance at end of period (Item 27 less items 28 and 29).....		700	000	00		NONE	NONE

*See up payment to Sec. 10(21) of National Reserve Code.

I, GEORGE H. BECKER, of the above-named bank, hereby certify that the foregoing statement is true, to the best of my knowledge and belief.JANUARY 9, 1951
(Date)

A. S. GOVERNMENT PRINTING OFFICE 16-58944-5

BLEED THROUGH

[fol. 828]

DEFENDANT'S EXHIBIT QQ

Savings Bonds poster.

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT RR

Form of payroll savings purchase order for United States Savings Bonds.

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT SS

Literature regarding United States Savings Bonds.

(Omitted pursuant to stipulation.)

DEFENDANT'S EXHIBIT TT

March 29, 1947

Mr. Charles Schock
 Deputy Superintendent of Banks
 State of New York Banking Department
 80 Centre Street
 New York 13, New York

Dear Charlie

I would appreciate receiving a copy of the opinion rendered by the attorney-general regarding the use of the word "savings" by national banks.

[fol. 829] In my mind the evidence seems to be clear that a national bank can use the word "savings".

Sincerely, — —, President.

ATR/cae

DEFENDANT'S EXHIBIT UU

June 5, 1947.

Mr. Charles H. Schoch,
New York State Banking Department,
80 Centre Street,
New York, New York.

Dear Mr. Schoch:

We are enclosing a copy of an opinion that was received from Alley, Cole, Grimes & Friedman, Counsellors At Law, 30 Broad Street, New York City, in which they state that National Banks may use the word "Savings" in their advertising.

We asked for this opinion in connection with our recent correspondence and also a proposed group mortgage insurance plan which the bank is considering.

Very truly yours, — — —, President.

Enclosure, ATR/cac.

[fol. 330] IN SUPREME COURT OF THE STATE OF NEW YORK,
NASSAU COUNTY

DECISION AND OPINION OF CUFF, J.—dated May 29, 1951

The question before this court is the constitutionality of a statute of the State of New York. By means of a properly instituted proceeding, the New York Attorney General, in the name of the People of the State of New York, seeks an injunction against defendant, the Franklin National Bank of Franklin Square, Nassau County, New York, a corporation organized and existing under the National Banking Act of the United States, restraining it from using the words "saving" or "savings" in its publicity and from holding itself out as a savings bank. Plaintiff bases its suit upon the New York Banking Law Section 258, subdivision 1, which reads as follows:

"No bank, trust company, *national bank*, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan asso-

ciation shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association [fol. 831] or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued." (Emphasis supplied.)

The complaint alleges: that defendant is a national bank organized and existing under the National Banking Act (12 U. S. C. A. Sec. 12, et seq); that the New York Banking Law (Sec. 258 (1)) prohibits defendant from using "saving" or "savings" or their equivalent in its business or in soliciting or receiving deposits as a savings bank; that since 1947, defendant has been using "saving" and "savings" in its business; that it has solicited accounts by forms of publicity in which it has used the words "saving" and "savings"; that such use of those words was calculated to and did lead the public to believe that defendant was a savings bank "with all attendant safeguards and benefits" (Comp. para. 6); that the use of "saving" and "savings", "as aforesaid", violated said section 258 (1) of the New York Banking Law; that although the Banking Department demanded that defendant desist—using those words, defendant refuses to do so; that plaintiff has no adequate remedy at law. Plaintiff demands a permanent injunction against defendant restraining it from using the words "savings" or "saving" (1) in its advertising, (2) in its banking or financial business and (3) as it holds itself out as a savings bank, by the use of a sign, or in its soliciting or receiving of deposits.

[fol. 832] The answer admits: that defendant exists by

virtue of the laws of Congress (12 U. S. C. A. Sec. 12, et seq); that it is not authorized to do business or hold itself out as a savings bank; that it has been using "saving" and "savings" in its business since 1947 to solicit savings accounts; that it has refused to discontinue its use of those words, although the New York Banking Department has demanded that it desist; that in its use of those two words, it did not try to lead the public to believe that it was a savings bank, nor does the public so believe. For a complete defense, defendant alleges that Section 258 (1) of the New York Banking Law is unconstitutional and void in so far as it purports to relate to defendant and national banks because (a) it conflicts with the constitution and laws of the United States; (b) it unduly interferes with and hinders the operations of national banks and defendant, frustrating them in accomplishing the purposes for which they were organized and (c) it discriminates against defendant and national banks, handicapping them substantially in their competition for savings deposits with savings banks and savings and loan associations.

The allegations in the complaint charging defendant with fraudulently simulating a savings bank and fraudulently holding itself out as a savings bank, were wholly unsupported by evidence at the trial. Defendant offered proof that when its bank was remodeled, the architect and builder were instructed to erect a building which resembled not a savings bank, but a department store and that was done [fol. 833] (717). Those charges, I find on the evidence, were completely unfounded; they are dismissed.

The issue at bar is not one of wrongdoing. The Attorney General seems to acknowledge that by not seeking to recover the penalty of \$100 a day which Sec. 258 (1) provides for its violation. This case tests the power of the state to legislate as it has (Sec. 258 (1)) with relation to national banks. The Attorney General believes it has that power, while defendant is convinced that it has not.

Defendant has openly employed the words "saving" and "savings" as it publicizes the fact that it may receive from the public "savings deposits" in the belief that the state has no control over its use of those words. The defendant

relies upon certain provisions found in the Federal Reserve Act, which read in part as follows: national banks may

“* * * continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such associations may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State Banks or trust companies organized under the laws of the State in which such association is located” (12 U. S. C. A., Sec. 371).

I will treat with the evidence adduced at the trial. (Numerals in parentheses refer to the Stenographer's Minutes.)

[fol. 834] The proof offered by plaintiff need not be detailed, because defendant admits all of the facts upon which plaintiff rests its case. It challenges only the motives ascribed by plaintiff that defendant sought to represent itself as a savings bank. Defendant offered proof to negative that deception charge in the complaint. I admitted that evidence (although no proof of intent to deceive had been submitted by plaintiff) only because plaintiff proved and defendant admitted that defendant used the word “savings” and “saving” in its publicity, and I felt that that defendant was entitled to show that its motives in so doing were marked by good faith. I have disposed of the fraud angle of this litigation; it will not again be referred to.

Returning to the subject of evidence offered by defendant, several presidents and other officers of national banks, including Arthur T. Roth, the president of defendant bank, testified. The experience and long service of these men in the banking world were not questioned. They said compositely that deposits in national banks were of two types—demand and savings; that the latter, interest bearing deposits, were received, recorded and handled through a separate department of the bank; that the demand accounts were the usual deposits received by any commercial (as distinguished from savings) bank; that savings deposits were indispensable to the maintenance of their respective

banks (728-9) that they (except defendant since 1947) refrained from using the words "savings" or "saving" in their business, unwillingly, out of deference to the prohibition contained in Sec. 258 (1) of the New York Banking Law (152, 154, 210, 217); that instead of those words they used, perforce, the terms "thrift", "compound interest" and "special interest" in their signs, records (deposit slips and pass books) and publicity in describing their savings department and in making known that they had the legal right to receive savings deposits (152, 210, 236); that having to use those substitutes hampered them in attracting savings deposits (121, 210, 211, 213, 238); that they rated the handicap accordingly imposed upon them as "definitely handicapped" (151) "stumbling block" (226) "considerable handicap" (239, 242), "detrimental" (239) "tremendous" (236) and similarly; that there was only one savings bank—the Roslyn Savings Bank—in Nassau County; (this Court takes judicial notice of the fact that that bank is not centrally located in Nassau County; nor is it in or reasonably near any of the larger business or congested centres and is rather inaccessible thereto by means of transportation except automobile.)

To continue the résumé of the testimony of defendant's witnesses, they testified that the said Roslyn Savings Bank advertised to no great extent; that New York City savings banks (Nassau County is adjacent to New York City) and its savings and loan associations, as well as Nassau County savings and loan associations, advertise extensively (209) and aggressively for savings deposits through the media of newspapers, direct mail, periodicals, radio and other sources, putting defendant and national banks at a disadvantage in the competition for savings deposits because they emphasize the word "savings" (210); that [fol. 836] demand deposits compare with savings deposits in their respective banks as follows: John R. Evans, president of the First National Bank of Poughkeepsie for 10 years, a banker of 27 years (139-141) stated that 40% of the total deposits were savings (161); Augustus B. Weller, a banker for 29 years, president for 17 years of Meadowbrook National Bank with two branches in Nassau County, testified that in 1934 the savings accounts totaled twice the

demand accounts (215) while currently, the demand accounts are \$15,000,000 as compared with savings accounts of \$12,000,000 (219); that that ratio (about 5 to 4 demand over savings deposits) has been maintained in recent years (219-220); William H. Abel, president Central National Bank of Mineola (although only recently made president, Mr. Abel had been executive vice-president for five years and affiliated with the bank for 21 years) testified (233) that prior to 1950 demand deposits were \$4,000,000, savings \$3,000,000 (244); Mr. Roth, president of defendant, testified that from 1941 to 1948 savings deposits exceeded demand deposits (726) but since 1948 the reverse is true, to wit: 60% demand, 40% savings (738); John J. Keuthen, president of Wheatley Hills National Bank since 1936, testified that if questioned his answers would have been substantially the same as the other bank officials with the modification that whereas they state that their savings deposits totals have increased in recent years, his bank has not enjoyed that condition but on the contrary, since 1948, his savings deposits have decreased (259).

[fol. 837] The cross examination of the bank officials did not alter the figures given or opinions expressed. Plaintiff's counsel in each instance, developed the point that the bank of which the witness was an officer bettered its deposit position progressively in recent years. But that development, the witnesses said, was not peculiar to Nassau County or even New York State (153, 154, 221, 222, 226, 251). Inflation, I would say, could be a contributing factor to that condition. I do not think that that general increase in deposits in banks bears upon the problem at bar.

It was stipulated that the testimony of two other bank officials, who were in the courtroom, if called to the stand, would have been substantially the same as that given by the bank officials who had already testified, with the reservation that plaintiff was not conceding the correctness or truth thereof.

Mr. Evans (First National Bank of Poughkeepsie) made the important disclosure that his bank derived more profit from savings deposits than it did from demand deposits (161).

Defendant also introduced evidence concerning a sample

poll to show the public understanding of the following terms: "savings", "thrift", "compound interest" and "special interest" as they relate to bank accounts (278). The object of the defense in introducing this evidence was to demonstrate that the term "savings account" is well understood by the public; that when disposed to open a bank account, the public reacts to the power of suggestion which the word "savings" generates and turns to the savings [fol. 838] bank with its business; that the three terms which defendant and other national banks are forced in their publicity to substitute for "savings" are not well understood and do not attract depositors in anything like the numbers that the word "savings" does.

This poll was planned and executed under the auspices of Hofstra College, a well-known and highly regarded institution of higher learning with 3800 students studying the arts, sciences, etc., located at Hempstead, Nassau County, New York. Although defendant paid for the services rendered, the College was actually retained by the Nassau Clearing House Association (277), an organization consisting of all except a few of the Nassau County banks, which serves the common interest of its members (203, 204). The work of the poll was assigned to the Psychology Department of Hofstra. Its planning and setting up came under the jurisdiction and guidance of Matthew Chappell, professor of psychology at Hofstra and chairman of the Department of Psychology (278). He worked continuously on the task from beginning to end. His experience, education and knowledge are important in appraising the evidentiary value, if any, to be ascribed to the poll, because he was the key figure. His history, appearance and manner indicate that he is a highly educated person; he has spent much of his life in the educational field, which has included sampling of public opinion; his work has made him a Diplomat of the American Board of Examiners in professional psychology (281); while teaching at Columbia University of New York City, he engaged in research work in the field [fol. 839] of "public opinion and mass buying behavior" and since 1938 has continued that study (264-265); he worked about two years (1938-1940) with Psychological Corporation in the Market and Social Research Division,

making use of polling techniques in business and industry; he was employed (1940-1943) by C. E. Hooper, Inc., the firm which conducts the so-called "Hooper Rating" polls; he maintained his own office (1943-1947) as a consultant, conducting polls for business and industry (265); he wrote books on psychology and collaborated with Mr. Hooper, aforementioned, in writing a book entitled "Radio Audience Measurement" (266); since 1938 he has actively participated in from 50 to 100 polling activities to ascertain the public mind on different subjects (269).

Mr. Chappell was aided, as his immediate assistant, by Richard Brumbach, a professor of Hofstra's Psychology Department (560) and an associate director of its Psychological Workshop (561). He had experience relating to polls—their planning, execution and analysis (1945-1950) with a research company (562-563). The field workers were senior students at Hofstra and the others who collaborated on the poll were of its faculty. All persons who participated were paid for their services (644).

This poll is known in the art as "probability sampling" (292). The testimony reveals that it was meticulously planned, executed and analyzed (266, et seq.). The objective of those who set it up was to query adults residing in Nassau County without *any person* exercising judgment in the selection of those to be interviewed (276, 292). The [fol. 840] identities of the interviewees were arrived at solely by a mathematical process (289). The result was a strictly random selection of them (276). By the processes adopted, considered the best method in the sampling art, (277), all human judgment in the choice of interviewees (which may control the results of a poll (294) was eliminated (237)). One of the objectives of the poll—and an important one—was to afford to every adult member of the population of Nassau County, an equal chance, with all other adults, of becoming an interviewee (289). I find that that ambition was closely approached by reason of the careful, intelligent, unbiased application of those in charge. The same kind of unprejudiced and careful methods, which marked the planning and supervision, were pursued in the actual interviewing (288, et seq., 423-440). Mr. Chappell knew that defendant paid the expenses for the taking of the

poll (372) but he did not know that the poll was to be used in a lawsuit until after the work had been completed and the poll and its results had been presented to defendant (646). Not only those who planned and supervised the poll testified but also two of the interviewers were witnesses (423-440). Upon plaintiff's counsel's statement that he had 18 other workers (interviewers) in court ready to testify, a stipulation was entered into by counsel that if the others (the 18) testified, that their testimony would be substantially the same as the two who had testified without plaintiff conceding the accuracy or truth of same (441).

The poll produced the following results: only 15% *did not know* the meaning of the term "savings account", while 53.3%, 62.7% and 52.7%, respectively, *did not know* the meaning of the terms "compound interest account", "special interest account" and "thrift account". Only 19.5% gave an accurate statement as to the meaning of "thrift account", 21.4% as to "special interest account" and 40.8% as to "compound interest account". In this compilation, full credit for accuracy was given to answers to the effect that the meaning of the substitute terms was the same as "savings account".

Without regard to actual percentages, the answers develop the point which this court has appreciated all along by reason of common knowledge, viz.: that the public understands the meaning of the term "savings account", for what it really is, far better than it understands the meaning of any of the substitute terms. I am also satisfied, based upon all the proof herein and judicial notice, that the word "savings", when used with the word "account" in relation to a bank, provokes a much stronger appeal to the eye and understanding of the public than do the substitutes, when placed before persons disposed to open an interest bearing bank account.

Polls, as evidence, are not controlling, of course. Many are misleading; valueless.

The learned Deputy Attorney General vigorously opposes the consideration or even the admission of the poll evidence, as hearsay and not within any exception to the well known rule. Both sides have briefed the question. The use of polls as a test of public opinion by business, news-

papers, periodicals and others is growing; already it is [fol. 842] widespread (295). There is no doubt that that testimony which is usually called "hearsay" has formed part of the proof at bar. The attorney general argues that the answers of those interviewed as reported by the interviewers, upon which the poll rests for its usefulness, in particular, are pure hearsay. On that point Jerome Prince in his recent (1948) revision of "Richardson on Evidence" (Seventh Edition) calls that kind of proof original evidence. He says: "Where the mere fact that a statement was made, as distinguished from its truth or falsity, is relevant on a trial, evidence that such statement was made is original evidence and not hearsay" (Sec. 246). This proffered proof (the answers) is testimony that the interviewees made the answers to the questions which the witnesses swear they asked them. It is no more than that. A Court accepts or rejects in whole or in part *as a fact* that answers were made as reported by the witnesses, depending upon the reliance that the Court places on the testimony of the witnesses. The value of the answers as evidence is something else. But that the answers were made can be a fact. The weight to be given to the answers would depend upon the poll itself. That returns us to the question of whether the poll proof should be received in evidence at all.

A party endeavoring to establish the public state of mind on a subject, which state of mind can not be proved except by calling as witnesses so many of the public as to render the task impracticable, should be allowed to offer evidence concerning a poll which the party maintains reveals that state of mind. The evidence offered [fol. 843] should include calling the planners, supervisors and workers (or some of them) as witnesses so that the Court may see and hear them; they should be ready to give a complete exposition of the poll and even its results; the work sheets, reports, surveys and all documents used in or prepared during the poll taking and those showing its results should be offered in evidence, although the Court may desire to draw its own conclusions. In this trial the learned counsel for defendant adduced proof of the kind to which I have just referred. I think that the proof as to the poll should be received in evidence. I also am satisfied that the

conclusions drawn therefrom are worthy of some consideration. Plaintiff's objections to the admission of this proof are overruled.

There is a difference between savings banks and commercial banks, including national banks (*Bank of Redemption v. Boston*, 125 U. S. 60). The savings bank has no stockholders. It is owned, if owned at all, by the depositors; total amount that each depositor may deposit is limited; its officers are their employees whom they appoint to receive and invest their deposits which are to be returned to them with the earned interest upon reasonable demand. There are no profits, as such. Profits, if any, ultimately are returned to the depositors in the form of interest. The investments made by their officers are circumscribed. They may make no commercial loans (loans on unsecured notes or notes secured by personal property other than "legal investments"); the amounts of their mortgage loans on realty are surrounded by statutory restrictions re-[fol. 844] ferable to the appraised value of the pledged realty, its location, the nature and age of the improvement thereon, amortization arrangements, duration of loan and stability of borrower (Sec. 235 (6) N. Y. Banking Law).

The commercial (national) bank is owned by its stockholders. Its officers are the employees of the board of directors, who in turn are the elected representatives of the stock. Those officers are expected, in managing the bank, to produce profits, which go to the stockholders in the form of ordinary dividends. A commercial bank may make, in the exercise of the sound judgment of its officers, unsecured loans and loans secured by personalty, which may even be merchandise. There is no limit upon the total amount it may receive from each depositor. It may provide money on mortgage loans like the savings bank based upon the appraised value of the pledged realty, but there are not the other rigid restrictions which are imposed upon savings banks (12 U. S. C. A. 371). While national banks receive and record their savings deposits separately from their demand deposits, both are pooled and provide one working fund. Thus savings deposits control as much as demand deposits, the volume of lending and investing in which national banks indulge.

It has been said that the savings bank is a semi-public institution; that the state in its wisdom seeks to encourage those who will save, particularly in small amounts; that the state has furnished a haven for the thrifty. I do not wish to cast the slightest reflection upon commercial banks and their stability when I say that the legislation [fol. 845] with respect to savings banks enacted by this state over the years was unmistakably intended to render the savings bank as safe and sound as laws could, to the end that those small depositors, encouraged as I have said to save, would run the least possible risk of losing their funds, and, incidentally, would receive as much interest as safety would permit. The power and discretion of the officers of savings banks are indeed narrow and circumscribed.

The New York State legislatures, enacting laws from time to time, were always seeking to protect deposits in savings banks, it would seem, solely for the benefit of the depositors, to assure each depositor as far as laws could assure, that his or her deposit would always be available upon reasonable demand. That legislation, however, was enacted and the decisions in harmony therewith were written before the national government insured bank deposits in *all* banks—federal and state—up to \$10,000 (Chap. 967 Public Law 797, enacted Sept. 21, 1950). \$10,000 is the limit which a savings bank may accept from any one depositor (Chap. 592, Laws of 1951).

As the matter stands today, all deposits in national banks are insured by the United States Government in exactly the same way as deposits in savings banks are insured, by the U. S. Government. In the light of this development, has not one of the principal reasons for the studied protective legislation referable to savings banks, including Sec. 258 (1) *Supra*, and the protective attitude of the courts in their reflective decisions become academic? Is that arm of state [fol. 846] protection to reassure bank depositors needed any more?

Prompted by its traditional zeal to clothe its savings banks with the ultimate in known safeguards against financial loss by depositors, the State of New York, due to its more recent enactment (Sec. 258 (1) *Supra*), has extended itself to the point where it stands accused by the defendant

herein of attempting to preempt certain fields of the banking business essential to the national government in maintaining its system of banking (12 U. S. C. A. Sec. 371) and by this suit the state seeks to judicially eject from those fields an important cog in that system, albeit a creature of the United States Government—the national bank.

Giving appropriate consideration to the evidence adduced herein by defendant, which proof is either not disputed or not successfully challenged, it is evident that Sec. 258 (1) of the New York Banking Law and Sec. 371 of the Federal Reserve Act cannot be read together in harmony. There is a violent conflict of legislative authority. We are obliged to ascertain the extent of that clash and the damage. Is there impairment, hampering, embarrassment or restriction exerted upon national banks by the New York statute, as they endeavor to achieve the objectives which Congress contemplated for them? If there is, that is a fatal legislative transgression by a state law (*First National Bank v. Commonwealth*, 9 Wall 353, 362; *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283; *McClellan v. Chipman*, 164 U. S. 347; *Waite v. Dowley*, 94 U. S. 527, 533).

[fol. 847] In specific terms, what does the New York statute seek to accomplish? The answer to that question will expose the inroads of the state statute, if any, upon the federal grant of power to national banks to receive "savings deposits". The statute may be divided into three, as far as this litigation goes, parts. The first part provides that "No * * * national bank * * * shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business. The second part provides that no national bank shall make use of the equivalent of 'saving or savings' *in relation to* its banking or financial business." The third part forbids national banks "in any way (to) solicit or receive deposits *as a savings bank*" (Sec. 258 (1)). (Italics supplied.) I will discuss the third part first. A national bank is not a savings bank. Nevertheless, Congress has granted it the power to solicit and receive "savings deposits" (Sec. 371, *Supra*). Obviously any national bank (the defendant is one) availing itself of that power, will provide space and facilities within its walls where such deposits may be made by the public and be received

by the bank. That particular part of the bank of necessity will give off an air of sanctuary where savings are to be banked. To that extent the national bank would assume some of the attributes typical of an institution where savings are ordinarily deposited. I cannot perceive how such a situation could be avoided, if the national bank is to receive "savings deposits". Could it be that the authors of Section 258 (1) of the New York Banking Law intended to render that inevitable situation a violation of that law [fol. 848] and to subject the national bank which, perforce gave it expression, to the prescribed penalties? The provision "nor shall" a national bank "in any way solicit or receive deposits as a savings bank" (Sec. 258 (1) Supra), I consider refers to a national bank simulating a New York savings bank for purposes of deception (*People v. Binghamton Trust Co.*, 139 N. Y. 185, 190). The element of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto. Therefore, the "third" part of Sec. 258 (1) may be disregarded.

But the "first" and "second" parts of the statute are different. To begin with, defendant admits violating those provisions. I find that those parts of the law apply with directness and force to this case. As far as the issues herein presented are concerned, however, the provisions of the law which I have designated "first" and "second" parts may be considered together. The language would seem to be restrictive, confining its prohibitions to those occasions only when a national bank is engaged "in its banking and financial business" (Sec. 258 (1)), but when the nature of the provisions is considered, the prohibitions are actually all inclusive, because only when a national bank is engaged "in its banking and financial business" does it receive "savings deposits" and does it have reason to use the forbidden words "saving" and "savings". Inferentially, Sec. 258 (1) forbids a national bank, *inter alia*, to use those words or their equivalent

- [fol. 849] (1) in its display of signs on its own premises
 (a) even to indicate its right to receive "savings deposits";

- (b) even for directional purposes to guide its customers to the place where "savings deposits" may be received;
- (c) even to designate the proper window for such depositing;
- (d) even to print the words "savings deposits" on its deposit slips and pass books;
- (e) even to print or write those forbidden words in any of its accounting records (see Defendant's Ex. PP, which requires national banks to use the word "savings" in those reports to the Comptroller of the Currency)

and

- (2) in any form of its advertising or its publicity, which, of course, includes oral as well as written, as long as the utterance relates to its banking or financial business.

Other similar inferential injunctions imposed by the law in question could be cited. Those enumerated surely *hamp*er defendant in the exercise of the power bestowed upon it by Congress as it exerts " * * * such incidental powers as shall be necessary to carry on the business of banking" (12 U. S. C. A. Sec. 24). Receiving "savings deposits" is a part (the uncontradicted evidence indicates that it is a very [fol. 850] important part) of defendant's banking business. The evidence also reveals that defendant could not function without "savings deposits" (728, 729). Therefore, receiving such deposits becomes a necessary element in enabling defendant to prosecute its banking business and to render the service to the United States Government in maintaining its system of banking and to the public which Congress intended it should. If receiving "savings deposits" is a necessary part of defendant's banking business crippling obstruction placed in defendant's way amounts to *impairment* of defendant's banking business. Likewise, the prohibitions mentioned above, viz.: no signs, no printing, no advertising and no publicity, with the words "saving" or "savings" therein, *embarrasses* defendant and certainly *restricts* it "tremendously" (236) in obtaining "savings deposits". (First National Bank v. Fellows, 244 U. S. 416,

37 Sup. Ct. 734; *Federal Nat'l Bank & Trust Co. v. Enright*, 264 Fed. 236, 239; *Paton's Digest* (1940), p. 645).

To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make "savings deposits" with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress.

Under such conditions, one law or the other must give way. The State Law must yield to the Federal Law—the supreme law of the land (U. S. Const. Article VI).

[fol. 851] Commencing with *McCulloch v. Maryland* (4 Wheat. 316), the Supreme Court as well as other courts, has consistently held that a state statute may not defeat in whole or in part the objectives expressed or implied in an Act of Congress which is constitutional. The facts in some of those cases are: In the above case, the state vainly sought to impose a tax upon a branch bank of the Bank of the United States. In *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U. S. 17, the state offense was legislation which forbade the appointment of national banks to serve as testamentary executors, while state trust companies competing with national banks were authorized to serve as such executors. In *First National Bank v. California* (262 U. S. 366), the invalidated state law provided for the escheat to the state of dormant deposits in a solvent national bank.

A quotation from *Easton v. Iowa*, 188 U. S. 220, typifies the attitude of the Supreme Court and provides a most obvious reason for its viewpoint. The court said: "That legislation (The National Banking Act) has in view the erection of a system extending throughout the country, and independent, as far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." (229). That decision also held that Congress " * * * having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks and has the sole [fol. 852] power to regulate and control the exercise of their operations * * *". Page (238).

To continue with examples of state laws invalidated for interference with federal instrumentalities, in *Fidelity National Bank & Trust Co. v. Enright*, 264 F. 236 (W. D. Mo. 1920), the voided state law forbade a national bank to use the words "trust" or "trust company" in its advertising, where the fact was that the word "trust" was part of the national bank's name; the name having been approved by the Comptroller of the Currency according to the National Banking Act.

I consider that I have cited a sufficient number of varying, as to the nature of the interferences, cases to demonstrate the state of the law with regard to particular situations, some of which, in their facts, approximate the facts in this case (*Fidelity National Bank & Trust Co. v. Enright*, *supra*, for instance).

There is no doubt that creatures of the Congress are subject to states' police powers enacted into law (*Engel v. O'Malley*, 219 U. S. 128; 31 S. Ct. 190; 55 L. Ed. 128, affirming 182 Fed. 365), but the law which accordingly subjects them should be an exercise of a real police power. Plaintiff cites no case in line with the situation at bar which supports his contention that Section 258 (1) is police power legislation. The facts and law deny that contention in this situation because deposits (up to \$10,000) in national banks are insured federally the same as savings banks' deposits are insured (up to \$10,000). I must hold that Sec. 258 (1) is not that type of law.

Plaintiff concedes that Section 371 of the Federal Reserve Act upon which defendant relies, authorizes national [fol. 853] banks, without equivocation, to receive "savings deposits". Plaintiff argues, however that neither that Act of Congress nor any other authorizes a national bank to advertise the fact. The answer to that contention is that such a power may be implied, especially since Congress has provided for national banks " * * * such incidental powers as shall be necessary to carry on the business of banking" (12 U. S. C. A., Sec. 24).

One would be wholly unobserving who did not recognize that there is competition among banks in the banking world; that the daily press abounds with advertising by banks; that often the rate of interest paid on savings ac-

counts is stressed. A witness in this case testified as to that stressing (209).

It cannot be denied—and it is not—that national banks may advertise for deposits, including savings deposits. The Attorney General argues that in such national bank advertising, the terms “time accounts” should be used or “thrift accounts” or one or more of the other substitutes to give public notice that national banks may receive “savings deposits.” He would have them use any term except “savings deposits”—the very words found in the Act of Congress. Is there any reason why national banks in their publicity should use the term “time deposits” and not “savings deposits”? Those two terms are side by side in Section 371 (12 U. S. C. A.).

The Attorney General further contends that when Congress amended the Federal Reserve Act by specifying “savings deposits” as a kind of deposit which a national bank [fol. 854] may receive, that action was without effect and without meaning, because at the time and for long prior, national banks were receiving what actually were savings deposits by virtue of their authority to receive “time deposits” (12 U. S. C. A. Sec. 371). I cannot subscribe to that reasoning. On the contrary, because of the peculiar wording of the empowering provision: National banks may “* * * continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same * * *”, I consider that Congress meant to accomplish two results: first, that national banks in the conduct of their business should have the benefit of people’s savings deposits and second, that all doubt about the right of national banks to receive such deposits should be dispelled. There had been some controversy concerning the right of a national bank to advertise and use the word “savings” which had been resolved in favor of the national banks by the administrative branch of the United States Government (Federal Reserve Bulletin, p. 18, (1915)). The choice of language by Congress was intended to legislatively put that dispute at rest. If the intendment of Congress was as I have indicated, a state law restricting the publicizing of the power thus granted would tend, may I repeat, to defeat the obvious objective of the law.

National banks may and do advertise (12 U. S. C. A., Sections 583-586). There are authorities directly in point. Paton's Digest (1940) holds that the right of a national bank to receive savings accounts necessarily includes the [fol. 855] incidental right to advertise as a national bank for such accounts (pg. 645). This author also expressed the same view in the 1926 edition of his Digest at page 1:226. To the same effect is 6 Fletcher's Cyclopedia of Corporations, Section 2508, pg. 305. There are federal departmental opinions holding similarly (1 Fed. Reserve Bulletin (1915), pg. 18). No judicial determination on the precise question has been cited in the briefs or in the textbooks.

I am satisfied that national banks, as they use the words "saving" and "savings" in advertising and publicizing that they may receive "savings deposits" are exercising an implied and incidental power conferred upon them by Acts of Congress (12 U. S. C. A., Sections 371 and 24).

The restrictive nature of New York Banking Law 258 (1) defeats the purposes for which Congress created defendant (12 U. S. C. A. 371). That defeat could be entire were defendant obligated to suspend for lack of enough savings deposits (728-9, 737), with which to operate its business. The New York Statute is unconstitutional.

Plaintiff's motions to strike out testimony and for judgment upon which I reserved decision are denied. Defendant's motion to dismiss the complaint at the end of the plaintiff's case upon which I reserved decision is denied. Defendant's motion made at the end of the whole case for judgment dismissing the complaint is granted with costs.

Judgment with costs in defendant's favor dismissing the complaint will be entered.

Thomas J. Cuff, J. S. C.

[fol. 856] IN SUPREME COURT OF THE STATE OF NEW YORK

STIPULATION AS TO PLAINTIFF'S EXHIBITS—June 9, 1952

It is hereby stipulated and agreed that the Exhibit 14 of plaintiff-appellant which was received and marked in evidence on the trial of this action be omitted from the printed record and that a descriptive statement be printed in lieu thereof; and

It is further stipulated and agreed that such omitted exhibit may be handed up on the argument of this appeal with the same force and effect as though incorporated in said printed record.

Dated, New York, June 9th, 1952.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Plaintiff-Appellant; Alley, Cole, Grimes & Friedman, Attorneys for Defendant-Respondent.

(J. 407) IN SUPREME COURT OF THE STATE OF NEW YORK
SUPPLEMENT AS TO DEFENDANT'S EXHIBITS—January 21, 1952

It is hereby stipulated and agreed that the following exhibits of Defendant Respondent which were received and marked in evidence or marked for identification on the trial of this action be and the same hereby are omitted from the printed record in the interest of economy and that a descriptive statement be printed in lieu thereof:

B, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S (except first two pages), T, U, V, W (for id.), X (for id.), Y, Z, AA, BB, EE (except first 4 pages), FF (for id.), GG (for id.), HH (for id.), II (for id.), OO (for id.), QQ, RR and SS.

It is farther stipulated and agreed that such omitted exhibits and unprinted portions thereof may be handed up on the argument of this appeal with the same force and effect as though incorporated in said printed record.

It is further stipulated and agreed that the Plaintiff-Appellant shall be furnished with at least twenty-five (25) copies of Defendant-Respondent's Exhibit C, and that 6 such copies shall be included in said printed record.

Dated, New York, January 21, 1952.

Nathaniel L. Goldstein, Attorney General of the State of New York, By Irving Rollins, Attorney for Plaintiff-Appellant; Alley, Cole, Grimes & Friedman, Attorneys for Defendant-Respondent.

[fol. 858] IN SUPREME COURT OF THE STATE OF NEW YORK

STIPULATION SETTLING CASE

It is hereby stipulated that an order may be entered settling this case without further notice.

Dated, June 30, 1952.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Plaintiff-Appellant; Alley, Cole, Grimes and Friedman, Attorneys for Defendant-Respondent.

IN SUPREME COURT OF THE STATE OF NEW YORK

ORDER SETTLING CASE

Upon the foregoing stipulation the foregoing case is herewith settled as the case in this action.

Dated, June —, 1952.

Thomas J. Cuff, J. S. C.

[fols. 859-862] IN SUPREME COURT OF THE STATE OF NEW YORK

ORDER FILING RECORD IN APPELLATE DIVISION

Pursuant to Section 616 of the Civil Practice Act, it is Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department.

Dated, June —, 1952.

Thomas J. Cuff, J. S. C.

[fol. 863] IN SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

NOTICE OF APPEAL TO COURT OF APPEALS—February 11, 1953

[Title omitted]

Sirs:

Please take notice, that the defendant, The Franklin National Bank of Franklin Square, hereby appeals to the Court of Appeals of the State of New York from the judgment of reversal in favor of the plaintiffs and against the defendant, entered in the office of the Clerk of the County of Nassau on the 11th day of February, 1953, which judgment was entered upon an order of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of the Appellate Division of the Supreme Court, Second Department, on the 12th day of January, 1953, which said order reversed (one of the Justices dissenting) the judgment of this Court entered herein the office of the Clerk of the County of Nassau on the 8th day of June, [fol. 864] 1951, dismissing the complaint in the above-entitled action upon the merits after trial and directed judgment in favor of the plaintiffs; and the defendant appeals from each and every part of said judgment of reversal as well as from the whole thereof.

Dated: New York, N. Y., February 11, 1953.

Yours, etc., Alley, Cole, Grimes & Friedman, Attorneys for Defendant, 30 Broad Street, New York 4, N. Y.

To: Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Plaintiffs, 80 Centre Street, New York 13, N. Y.

Ernest F. Francke, County Clerk, Nassau County, Supreme Court.

[fol. 865] IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, BOROUGH OF BROOKLYN

Present: Hon. Gerald Nolan, Presiding Justice, Hon. William B. Carswell, Hon. Frank F. Adel, Hon. Henry G. Wenzel, Jr., Hon. Frederick G. Schmidt, Justices.

[Title omitted]

ORDER OF REVERSAL—January 12, 1953

The above-named The People of the State of New York, the plaintiffs in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Nassau on the 8th day of June, 1951, dismissing the complaint on the merits after trial, herein, and the said appeal having been argued by Mr. Daniel M. Cohen, [fol. 866] Assistant Attorney General, of Counsel for appellant, and argued by Mr. Charles P. Grimes of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the Court herein, dated January 12th, 1953, heretofore filed:

It is ordered and adjudged, that the judgment so appealed from be and the same hereby is reversed on the law and the facts, with costs, and judgment directed for the plaintiff, with costs, restraining defendant, its officers, agents, servants and employees from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank; and it is

Further ordered, that the findings of fact contained in the decision and opinion of the trial Court, inconsistent herewith, are hereby reversed, and it is

Further ordered, that new findings are made as are indicated in the opinion and decision slip of this Court dated January 12th, 1953, which is expressly referred to for the purposes provided in Section 607 of the Civil Practice Act.

Carswell, Wenzel and Schmidt, JJ., concur; Nolan, P.J., dissents and votes to affirm with memorandum as set forth

in opinion and decision slip dated January 12th, 1953.
Adel, J., not voting.

Enter:

John J. Callahan, Clerk.

[fol. 867] Clerk's Certificate to foregoing paper omitted
in printing.

[fol. 868] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU

County Clerk Index No. 2982—1950

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant

JUDGMENT OF REVERSAL—February 11, 1953

An appeal having been taken by the above-named plaintiffs, the People of the State of New York, to the Appellate Division of the Supreme Court for the Second Judicial Department from a judgment of the Supreme Court entered in the office of the Clerk of the County of Nassau on the 8th day of June, 1951 dismissing the complaint herein on the merits after trial, and said appeal having been heard and said Appellate Division having by an order entered in the office of the Clerk of said Court on the 12th day of January, 1953 by a divided court reversed said judgment on questions of law and fact, with costs, and having reversed certain findings of fact and conclusions of law and having made new findings of fact and conclusions of law in place thereof, as indicated in the opinion and decision slip of said Appellate Division, dated January 12, 1953, filed in the office of the Clerk of the said Appellate Division on [fol. 869] January 12, 1953, and having directed judgment for the plaintiffs, the People of the State of New York

against the defendant, the Franklin National Bank of Franklin Square, with costs, restraining said defendant, its officers, agents, servants and employees from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank, and the remittitur on said appeal having been filed in the office of the Clerk of the County of Nassau on the 11th day of February, 1953, and the costs of said action and appeal having been taxed in the sum of Two thousand five hundred twenty-five and 85/100 dollars (\$2,525.85), it is, upon motion of Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for the plaintiffs,

Ordered and adjudged, that the judgment so appealed from be and the same hereby is reversed upon questions of law and fact, that the findings of fact and conclusions of law contained in the decision and opinion of the trial court, which are inconsistent with the new findings of fact and conclusions of law made by the said Appellate Division contained in the opinion and decision slip of said court dated January 12, 1953 and filed in the office of the Clerk of the Appellate Division are hereby reversed and that the findings of fact and conclusions of law so made by the Appellate Division and contained and indicated in the opinion and decision slip of the said Appellate Division dated [fol. 870] January 12, 1953 and filed in the office of the Clerk of the said Appellate Division on January 12, 1953 be and the same are hereby made the findings of fact and conclusions of law of this court, and it is further,

Ordered and adjudged, that the defendant, the Franklin National Bank of Franklin Square, its officers, agents, servants and employees be and they are permanently restrained and enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public and from in any way soliciting or receiving deposits as a savings bank," and it is further,

Ordered and adjudged, that the plaintiffs, the People of the State of New York of Albany, New York, recover from the defendant, the Franklin National Bank of Franklin

Square, of No. 315 Hempstead Turnpike, Franklin Square, Long Island, New York, the sum of Two thousand five hundred twenty five and 85/100 dollars (\$2525.85) the costs of the action and appeal as taxed and that the plaintiffs have execution therefor.

Dated: Mineola, Long Island, N. Y., February 11, 1953.

Ernest F. Francke, Clerk.

[fol. 871] IN SUPREME COURT, APPELLATE DIVISION—SECOND DEPARTMENT

OPINION OF THE APPELLATE DIVISION

By: Nolan, P.J.; Carswell, Adel, Wenzel and Schmidt, JJ.

People, &c., ap. v. Franklin Nat. Bank of Franklin Square, res—Action by the People of the State of New York against a national bank for a permanent injunction, restraining defendant from violating subdivision 1 of section 258 of the Banking Law. Plaintiff appeals from a judgment dismissing the complaint on the merits after trial.

Judgment reversed on the law and the facts, with costs, and judgment directed for the plaintiff, with costs, restraining defendant, its officers, agents, servants and employees from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank.

Findings of fact inconsistent herewith are reversed and new findings are made as indicated herein.

Respondent admitted deliberate violation of the statute and failed to establish its defense of unconstitutionality.

Savings banks have developed in this state as a distinctive type of mutual institution, since their beginning, with special benefits and safeguards (*Mercantile Bank v. New York*, 121 U. S., 138). For almost a century only such banks [fol. 872] have been allowed by state law to put forth a sign as a savings bank (Laws of 1858, chap. 132). For almost half a century the only banks permitted to use the word "savings" in the State of New York have been the mutual savings banks (Laws of 1905, chap. 564). Thus

there was basis for a legislative finding that in the course of time the word "saving" or "savings" had become so associated with the idea of "savings bank" that, if used by another kind of bank, some people were apt to be misled into thinking it to be a mutual savings bank (*Herring, &c., Safe Co. v. Hall's Safe Co.*, 208 U. S., 554, 559, 9 L. R. A., 148; *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; 150 A. L. R., 1095, 1134-1135, and cases cited in annotation). In addition there is a presumption that there was sufficient basis for the Legislature to act (11 Am. Jur., Constitutional Law, sec. 132) which respondent failed to meet and overcome by competent proof.

The police power of the state is not limited to the preservation of public health and safety, but extends to the prevention of fraud, deceit and imposition (*Merchants Exchange v. Missouri*, 248 U. S., 365; *Hall v. Geiger-Jones Co.*, 242 U. S., 539). Such power may be exercised to protect not only the intelligent and prudent, but also the ignorant and rash, from being imposed upon (*Dillingham v. McLaughlin*, 264 U. S., 370, 374; *Dent v. West Virginia*, 129 U. S., 114, 122; *People ex rel. Bennett v. Leman*, 277 N. Y., 368, 375). Section 258 of the Banking Law is an exercise of the police power aimed at preventing a deception from being practiced upon the public (*People v. B. T. [fol. 873] Co.*, 139 N. Y., 185, 192). As such, its prohibition of the use of the words in question does not constitute an unreasonable deprivation of rights (*Dillingham v. McLaughlin*, *supra*).

In such a case it is not necessary that there be intent to deceive; the state may seek to prevent innocent, as well as intentional, deception (*Federal Trade Comm'n v. Algoma Co.*, 291 U. S., 67; *Quaker Oats Co. v. City of N. Y.*, 295 N. Y., 527; *General Motors Corp'n v. Federal Trade Comm'n*, 114 F., 2d, 33, 36). Nor did the establishment of the Federal Deposit Insurance Corporation vitiate the statute in question for it did not eliminate the need upon which the law was based. Since the assets of this corporation and the coverage it provides, are limited, its protection against loss is limited. Furthermore, it in no way prevents the public from being misled, to which protection it is entitled (*Federal Trade Comm'n v. Algoma Co.*, *supra*) and

for which purpose the statute was enacted (*People v. B. T. Co.*, *supra*).

The state statute herein is not in conflict with federal law. National banks possess only the powers conferred by Congress (*Colorado Bank v. Bedford*, 310 U. S., 41, 48). It is conceded that the provision of the Federal Reserve Act relied upon by respondent (U. S. Code, title 12, sec. 371), does not expressly confer upon such banks the right to use the words "saving" or "savings" in their dealings with the public; and since both the state and federal statutes can consistently stand together it may not be implied that when Congress authorized national banks to [fol. 874] "continue * * * to receive * * * savings deposits" it intended thereby to supersede the state statute prohibiting them from advertising in a manner found to be misleading by the State Legislature (*First Nat. Bank v. Missouri*, 263 U. S., 640; *Napier v. Atlantic Coast Line*, 272 U. S., 605, 611; *Maurer v. Hamilton*, 309 U. S., 598, 614; *Reid v. Colorado*, 187 U. S., 137, 148; *Savage v. Jones*, 225 U. S., 501, 533-534).

Neither does the challenged statute unduly interfere with the operation of a federal instrumentality. While there is testimony that the prohibition contained therein imposes an advertising handicap on them in their efforts to increase their interest-bearing accounts, the undisputed evidence that such accounts have grown substantially, and that national banks have enjoyed continued prosperity notwithstanding said statute, refutes the claim that it is a "crippling obstruction."

National banks, being *privately owned* stock corporations in which the government has an interest, are not entitled to the privileges of government departments (*Emer. Fleet Corp'n v. Western Union*, 275 U. S., 415, 425-426) and are not entitled to the immunities of the United States, or any state or political subdivision thereof (*National Labor Relations Board v. Bank of America, &c.*, 130 F., 2d, 624, 626-627, cert. den. 318 U. S., 791). State regulations under the police power are not invalid, even when they impose some burdens on the *national government* of the same kind as those imposed on citizens within the state's borders (*Okla-* [fol. 875] *homa Tax Comm'n v. Texas Co.*, 336 U. S., 342,

352; *Penn Dairies v. Milk Control Comm'n* 318 U. S., 261, 270-271). It follows that such a regulation is not improper solely because it places some burden on *national banks* (*First Nat. Bank v. Missouri*, 263 U. S., 640; *Hall v. Geiger-Jones Co.*, 242 U. S., 539).

Nor is the state statute herein discriminatory, for by its terms it applies equally to all commercial banks, state-chartered as well as nationally-chartered. For purposes of regulation, banks may be divided into different classes (12 Am. Jur., *Constitutional Law*, sec. 506, pp. 187-188); and savings banks, which do not operate under the same conditions as commercial banks, form a reasonable classification where, as here, such differentiation is required for a valid statutory purpose (*Provident Savings Institution v. Malone*, 221 U. S., 660, 666; *Mercantile Bank v. New York*, 121 U. S., 138, 161). Since the prohibition applies equally to all institutions in similar circumstances and operating under the same conditions, it is not such class legislation as is prohibited by constitutional provisions (12 Am. Jur., *Constitutional Law*, secs. 504 and 505, pp. 185-187 and cases cited; *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540; *Cotting v. Kansas City Stock Yards Co., &c.*, 183 U. S., 79).

Finally, the statute does not forbid the use of the expressions heretofore permitted by the state banking department (2 Sutherland "*Statutory Construction*" [3d ed.], sec. 5107, and cases cited); or in terms prohibit the voluntary publicizing of United States Savings Bonds in furtherance of [fol. 876] *government business* (*Davis v. Elmira Savings Bank*, 161 U. S., 275); nor do reports to government departments come within its purview.

CARSWELL, WENZEL and SCHMIDT, JJ., concur.

NOLAN, P.J., dissents and votes to affirm, with the following memorandum: Section 258 of the Banking Law is in conflict with the federal statute (Federal Reserve Act, U. S. Code, tit. 12, sec. 371), in so far as it *forbids* the use of the word "savings." I agree that the state has the power to protect the public, by preventing national banks from purporting to act as savings banks and even from using the word "savings" in a manner which might deceive depositors in that respect. The purpose should be accom-

plished by regulation, however, and not by a prohibition which would prevent even a verbatim statement by a national bank of the federal law, which specifically permits national banks to receive *savings* deposits.

ADEL, J., not voting.

[fol. 877] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 878] Affidavit of service (omitted in printing).

[fols. 879-880] IN COURT OF APPEALS OF STATE OF NEW YORK

At a Court of Appeals of the State of New York, held at Court of Appeals Hall in the City of Albany, on the sixteenth day of April, A. D. 1953.

Present, Hon. Edmund H. Lewis, Senior Associate Judge,
Presiding.

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO FILE A BRIEF AMICUS
CURIAE

A motion having heretofore been made herein upon the part of the New York State Bankers Association for leave to file a brief amicus curiae, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted.

A copy,

Gearon Kimball, Deputy Clerk (Seal).

[fol. 881] IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, Appellant

OPINION OF THE COURT OF APPEALS OF NEW YORK—July 14th, 1953

Desmond, J. Defendant is a national bank, organized under the National Bank Act (U. S. Code, tit. 12, § 21 et seq.). Pursuant to authorization by the Comptroller of the Currency, it transacts banking business in the village of Franklin Square, Nassau County, New York. In this suit, brought by the State because of alleged violations by defendant of subdivision 1 of Section 258 of the New York Banking Law, defendant has been restrained and enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank". Section 258 (subd. 1, *supra*) is in full as follows:

"§ 258. *Prohibition of unauthorized savings banks and use of the word 'savings'; exceptions as to school savings.*

"1. No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which [fol. 882] is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, part-

nership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

It is undisputed that defendant has, since 1947, used the words "saving" and "savings" in many different ways, in the advertising and conduct of its banking operations. It has, by advertising and otherwise, solicited "savings accounts", has put up over some of its tellers' windows, signs containing the word "savings", has a special department for "Children's Savings", refers in its literature and printed forms to its 'savings department' and, in general, it routinely and extensively uses the words "saving" and "savings" to bring to itself "savings deposits" in competition with savings banks and savings and loan associations in Nassau County and elsewhere. Thus it is clear, without further elaboration of the facts, that this national bank has in fact violated so much of Section 258 (subd. 1, *supra*) as prohibits the use of the two words "saving" and "savings". However, we find in the record no evidence at all that defendant has violated, or threatens or tends to violate, the other prohibition of the above-quoted statute, which runs against "soliciting or receiving deposits as a savings bank". Therefore, so much of the injunction as prohibits "soliciting or receiving deposits as a savings bank" is unwarranted and must be stricken regardless of anything else in the case (1 High on Injunctions [4th ed.] § 22: *Exchange Bakery & Restaurant v. Rifkin*, 245 N.Y. 260, 265, 28 Am. Jur., Injunctions, § 29).

[fol. 883] That brings us to our real question: is the State statute above quoted unconstitutional as contravening a controlling and over-riding Federal statute on the same subject, and as interfering with the operations of a national bank?

First, as to whether there is a contrary Federal statute: the enactments which, according to appellant, authorize it, as a national bank, to use and advertise the word "saving" or "savings" are in the Federal Reserve Act, and are Sections 371 and 583-586 of title 12 of the United States Code. The statutory language on which appellant relies is in Section 371 (U.S. Code, tit. 12), as follows: "Any such

[national banking] association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed", and in Sections 583-586 (U.S. Code, tit. 12 [now in U.S. Code, tit. 18, § 709]), which (in a negative sort of way) authorize national banks to advertise, and which contain no prohibition against the use, in such advertising, of the word "saving" or the word "savings" (see, also, U.S. Code, tit. 12, § 24, as to "incidental powers" of national banks, and *Hernandez v. First Nat. Bank*, 125 Neb. 199, 205). Defendant-appellant says that the matter is as simple as this: Congress has (expressly) licensed these national banks to receive "savings deposits" and pay interest on "savings", and has (inferentially) licensed them to advertise to the public the provision of such banking services. So, says appellant, we have a direct conflict between the authorizations of the Federal statutes and the prohibitions of the State Banking Law.

[fol. 884] There is no dispute as to the respective roles which the United States Government and the several States play, generally, in regulating national banks. Under Section 8 of Article I of the Federal Constitution, Congress has power to, and does, incorporate national banks and has the paramount power of regulating them; any applicable Federal laws are supreme in the field; national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not interfere with the functioning of the banks, and which do not contravene Federal laws (*First Nat. Bank v. California*, 262 U.S. 366, 368; *Burnes Nat. Bank v. Duncan*, 265 U.S. 17; *Lewis v. Fidelity Co.*, 292 U.S. 559, 566; *Seabury v. Green*, 294 U.S. 165, 169; *Jennings v. U.S.F. & G. Co.*, 294 U.S. 216; *Anderson Nat. Bank v. Lockett*, 321 U.S. 233; *Roth v. Delano*, 338 U.S. 226, 230; *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 441; *Lauer v. Bayside Nat. Bank*, 244 App. Div. 601; *Matter of Baldwins-*

ville Fed. Sav. & Loan Assn. [Van Wie], 268 App. Div. 414, 422, 423; *Clark v. First Nat. Bank of Morrisville*, 130 Misc. 352, 354; *United States Pipe & Foundry Co. v. City of Hornell*, 146 Misc. 812, 815; *Matter of Keene*, 152 Misc. 424, 425; 7 Michie on Banks and Banking, ch. 15, §§ 3, 4, 5). Clearly, "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law" (*Lewis v. Fidelity Co.*, *supra*, 292 U.S., at p. 566). [fol. 885] Since our State statute clearly and unambiguously forbids the very thing defendant is admittedly doing, our problem comes down to this: do the Federal statutes above cited contain, or amount to, an express authorization to national banks for such activity, that is, for using the State-prohibited words "saving" and "savings", or is the Federal statutory reference to "savings deposits" merely descriptive of a well-known type or kind of bank deposits, rather than a statutory license to use certain specified words, which in turn are forbidden in this State? We conclude, for reasons hereafter stated, that there is no direct conflict, between the Federal and State statutes, as to what national banks may and may not do by way of advertising for, and taking, "savings deposits". The State of New York does not prevent defendant from carrying on a particular kind of banking business, but does forbid a misleading description of that business.

State laws promoting fairness in business transactions should, of course, apply to national banks (*Schramm v. Bank of Cal.*, 143 Ore. 546, 578; *Steadman v. Redfield*, 67 Tenn. 337, 338-339; and see remarks of Justice Holmes, re competition, in *Abilene Nat. Bank v. Dolly*, 228 U.S. 1, 4). Our State law expresses an old, wise policy of protecting our citizens against being fooled (see *People v. Binghamton Trust Co.*, 65 Hun 384, *affd.* 139 N.Y. 185, as to the legislative purpose). So, read, our State statute is valid and enforceable despite a superficial, or seeming, contradiction between the phrasing of the two enactments. In other words, while the Federal statute prescribes the kind of business that national banks may carry on, the State statute, to avoid deception of our people, interdicts the use, in [fol. 886] that Federally-prescribed business, of certain

nonessential words, and there is no Federal statute relating to the use of those words, as such. Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage. The Attorney-General of New York, in his brief, makes it clear that this State does not claim for savings banks a monopoly on receipt of deposits of the "savings" type, but he insists that the State of New York is acting within its powers in seeing to it that members of the public are not misled into believing that commercial banks, like defendant, are mutual savings banks. He admits that the national banks are empowered to handle "savings" type deposits, and to advertise, but he argues that the State is not hampering either of those activities.

It is unnecessary here to describe in detail the differences between commercial and savings banks (see New York State Banking Law, arts. III, V, VI; 8 Michie on Banks and Banking, ch. 16, § 1; *Matter of Wilkins*, 131 Misc. 188, 193; *State v. People's Nat. Bank*, 75 N.H. 27; *Bank of Redemption v. Boston*, 125 U.S. 60, and see the learned opinion of the Special Term Justice in the present case, 200 Misc. 557, 566 *et seq.*). The difference, shortly stated, is this: commercial banks, State and national, are profit-making business corporations owned by stockholders, while, in New York at least, savings banks are mutual institutions, having no stockholders but earning money for the depositors, the fundamental purpose of their existence being protection of small deposits, and their principal method of accomplishing that purpose being caution and conservatism in investments (see 1 Morse on Banks and Banking [6th ed.], § 3).

[fol. 887] On the question of whether this New York statute unduly impedes national banks in carrying out their lawful purposes, it is significant, although not conclusive, that this record shows that none of the national banks operating in New York State, except defendant, have used the word "saving" or "savings", and that all of them (except defendant) have found it possible (although seriously inconvenient, say defendant's witnesses) to carry on the business of receiving this type of deposit, by the use, in their advertising and other literature and business forms, of

such synonymous expressions as "special interest account", "thrift account" and "compound interest account".

The New York Legislature's design and effort to prevent deception as to savings banks has a long history. The first enactment was in chapter 132 of the Laws of 1858, which, among other things, made it unlawful for a certain kind of commercial bank to "put forth a sign as a savings bank" (see, also, L. 1875, ch. 371: *People v. Doty*, 80 N.Y. 225). The prohibition against describing a commercial bank as a savings bank was added to and strengthened by a 1905 enactment (ch. 564), which forbade the use of the word "savings", by any but savings banks or building and loan associations. Thus, the general legislative purpose has been asserted for nearly a century and the statute in its present form is nearly a half century old. The validity of this purpose and the general validity of these statutes has, over and over again, been asserted by the State Attorney-General (see 1898 Atty. Gen. 265-267; 1902 Atty. Gen. 314-315; 1907 Atty. Gen. 473-475; 1908 Atty. Gen. 382-383). The 1907 opinion contained a specific holding that national banks had no right to hold themselves out as savings banks, or to [fol. 888] advertise as such (however, there was then no specific reference in the Federal laws to "savings accounts"). All of this adds up to this result: that the New York policy and method is an old and reasonable one, that it does not seem, when complied with by other national banks in this State, to have had seriously harmful effects on them, and that, accordingly, the legitimate national banking activity, of taking and advertising for interest accounts, is not substantially interfered with by the State's prohibition of the use of misleading words. Insofar as the record presents a question of fact as to the substantiality of that interference, the weight of evidence confirms the finding of the Appellate Division that the number of accounts of the "savings type" has increased greatly in those national banks in the State which have obeyed subdivision 1 of Section 258, and that those national banks "have enjoyed continued prosperity notwithstanding said statute" (281 App. Div. 757, 758).

We see no benefit to appellant's position in the fact that since 1905, our statute has permitted a "savings and loan

association" as well as a "savings bank" to use the words "saving" and "savings". The character and purposes of savings and loan associations are, under New York law (see Banking Law, art. X), so similar to those of savings banks as to call for the same kind of protection.

The judgment of the Appellate Division should be modified by striking from the second ordering paragraph thereof the words "and from in any way soliciting or receiving deposits as a savings bank" and, as so modified, affirmed.

FULD, J. (dissenting). While federal legislation explicitly authorizes national banks to receive "savings deposits" and to pay interest on "savings" (Federal Reserve Act, U.S. Code, tit. 12 § 371) and vests them with "such incidental powers as shall be necessary" (National Bank Act, [fol. 889] U.S. Code, tit. 12 § 24, subd. 7: see *Clement Nat. Bank v. Vermont*, 231 U.S. 120, 140), this state's Banking Law, in contrast, unequivocally prohibits a "national bank" from making "use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use [of] any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business" (Banking Law, § 258, subd. 1).

Mere reading of these two provisions reveals a conflict, patent and irreconcilable. New York's Banking Law provision severely limits the power of national banks to do exactly what the federal statute authorizes. (See, e.g., 2 Paton's Digest of Legal Opinions [1926 ed.], p. 1226; 1 Paton's Digest of Legal Opinions [1940 ed.], p. 645.) The right to accept "savings deposits" and maintain "savings accounts" can mean very little if the bank, by virtue of state statute, must hide that fact or announce it in terms that fail to make it clear. Indeed, to tell a bank that it can receive "savings deposits" and yet must not publicize the fact is very much like telling a property owner that he may produce vegetables, but must not water or cultivate them.

In a very real sense, the state statute hampers the conduct of banking activities deemed by the federal government to be necessary and beneficial. As the court at Special Term succinctly declared, "To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make 'savings deposits' with it, is to curtail

power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress. Under such conditions, one law or the other [Vol. 890] must give way. The State law must yield to the federal law—the supreme law of the land (U.S. Const., art. I).” (200 Misc. 557, 571.)

The state acknowledges, as, of course, it must, that national banks are empowered, as an incident of their business, to receive “savings deposits” and maintain “savings accounts.” Since those activities are concededly legitimate and in the public interest, there is no basis for the claim that advertising them *in the precise language of the Federal Reserve Act* can be deceptive or harmful. If a national bank conducts only the type of business which the Federal Reserve Act sanctions and if it informs the public of the nature of that business by using only the exact language of the federal enactment, how may it be said—as it is (opinion of Desmond, J., p. 460)—that the state law serves the vital function “of protecting our citizens against being fooled”?*

Section 258 of the Banking Law, insofar as it prohibits national banks from quoting the very words of the Federal Reserve Act, authorizing them to receive and pay interest on “savings deposits”, clashes with the paramount federal law and, accordingly, must be stricken as unconstitutional. Cf., e.g., *Easton v. Iowa*, 188 U.S. 220, 229-230, 238; *First Nat. Bank v. California*, 262 U.S. 366, 368 *et seq.*; *Fidelity Nat. Bank & Trust Co. v. Enright*, 264 F. 236; *Springfield Inst. for Sav. v. Worcester Fed. Sav. & Loan Assn.*, 329 Mass. —, 107 N.E. 2d 315, certiorari denied 344 U.S. 84.)

[Vol. 891] The judgment of the Appellate Division should be reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

*Virtually eliminated, it should be noted, is any risk of loss to those who maintain a “savings, time, or thrift account” in a national bank; such deposits, up to \$10,000 by any depositor, are insured by the Federal Deposit Insurance Corporation (Federal Deposit Insurance Act, U.S. Code, tit. 12, § 1813, subd. 1; § 1821).

Lewis, Ch. J., Conway, Dye and Van Voorhis, JJ., concur with Desmond, J.; Fuld, J., dissents in opinion in which Froesel, J., concurs.

Judgment accordingly.

[fol. 892] IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—July 14, 1953

[fol. 893]

No. 81

THE PEOPLE &c., Respondent,

vs.

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Appellant

Be it Remembered, That on the 27th day of March in the year of our Lord one thousand nine hundred and fifty-three, The Franklin National Bank of Franklin Square, the appellant in this cause, came here unto the Court of Appeals, by Alley, Cole, Grimes & Friedman, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 894] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Charles P. Grimes, of counsel for the appellant, and by Mr. Daniel M. Cohen, of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified in accordance with the opinion herein and, as so modified, affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the

said Supreme Court, there to be proceeded upon according to law.

[fol. 895] Therefore, it is considered that the said judgment be modified &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, July 14, 1953.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk (Seal).

[fol. 896] IN THE SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF NASSAU, SPECIAL TERM, PART I

Present: HON. PERCY D. STODDART, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,
against

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Defendant

JUDGMENT OF AFFIRMANCE—filed July 29, 1953

An appeal having been taken by the above-named defendant, The Franklin National Bank of Franklin Square, to the Court of Appeals of the State of New York from

the judgment of reversal of this Court entered upon the order of the Appellate Division of the Supreme Court, Second Department, in the office of the Clerk of the County of Nassau on the 11th day of February, 1953, reversing the judgment theretofore entered in the office of the Clerk of the County of Nassau on the 8th day of June, 1951, dismissing the complaint herein on the merits after trial and upon such reversal granting judgment in favor of the plaintiffs, with costs, restraining the defendant, its officers, agents, servants and employees from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits [fol. 897] as a savings bank, and the defendant having appealed from each and every part of said judgment of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged, that the said judgment so appealed from as aforesaid be modified by striking from the second ordering paragraph thereof the words "and from in any way soliciting or receiving deposits as a savings bank" and that as so modified the judgment of reversal be affirmed without costs and having further ordered and adjudged, that the proceedings therein be remitted to this Supreme Court, there to be proceeded upon according to law; and the remittitur from the said Court of Appeals having been filed herein, now on motion of Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for the plaintiffs herein, it is hereby

Ordered and Adjudged, that the order and judgment of the said Court of Appeals be and the same are made the order and judgment of this Court; and it is further

Ordered and Adjudged, that the judgment entered herein on the 11th day of February, 1953, be and the same is hereby modified by striking from the second ordering paragraph thereof the words "and from in any way soliciting or receiving deposits as a savings bank" so that the second ordering paragraph reads as follows:

'Ordered and Adjudged, that the defendant the Franklin National Bank of Franklin Square, its officers,

agents, servants and employees be and they are permanently restrained and enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public," and it is further'

[fol. 898] and as so modified, the judgment entered herein on February 11, 1953, be and the same is hereby affirmed without costs.

Enter,

P. D. S., J. S. C.

[fol. 899] IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NASSAU

[Title omitted]

AFFIDAVIT—filed July 29, 1953

STATE OF NEW YORK,

County of New York, City of New York, ss:

Daniel M. Cohen, being duly sworn, deposes and says:

1. He is an Assistant Attorney-General of the State of New York and is familiar with the above-entitled litigation.

2. By notice of appeal, dated February 11, 1953, the defendant Franklin National Bank of Franklin Square appealed to the Court of Appeals of the State of New York from the judgment of reversal in favor of the plaintiffs and against the defendant entered in the office of the Clerk of the County of Nassau on the 11th day of February, 1953, which judgment was entered upon an order of the Appellate Division of the Supreme Court, Second Department, entered in the office of the Clerk of the Appellate Division on the 12th day of January, 1953, which said order reversed the judgment of this Court entered herein in the office of the Clerk of the County of Nassau on the 8th day of June, 1951, dismissing the complaint herein after trial and which upon such reversal directed judgment in favor of the plaintiffs.

3. The Court of Appeals on July 14, 1953, having heard the appeal argued, ordered and adjudged that the Appellate Division of the Supreme Court appealed from be [fols. 900-901] modified in accordance with the opinion and as so modified affirmed. The sole modification provided for in the opinion of the court was for the deletion from the second ordering paragraph of the judgment entered herein on February 11, 1953, of the words "and from in any way soliciting or receiving deposits as a savings bank". As directed by the Court of Appeals remittitur dated July 14, 1953, the second ordering paragraph of the judgment of February 11, 1953, should read as follows:

'Ordered and Adjudged, that the defendant, the Franklin National Bank of Franklin Square, its officers, agents, servants and employees be and they are permanently restrained and enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public," and it is further'.

4. The remittitur of the Court of Appeals is being filed herewith.

5. The order and judgment of the Court of Appeals should accordingly be made the order and judgment of this Court and the judgment entered herein on February 11, 1953, should be modified in accordance with the direction of the Court of Appeals and except as so modified the judgment should be affirmed without costs.

6. No previous application for the relief sought herein has been made.

Daniel M. Cohen, Assistant Attorney General of
the State of New York.

Sworn to before me this 27th day of July, 1953.

Irving L. Rollins, Assistant Attorney General of
the State of New York.

[fol. 903] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

PETITION FOR APPEAL—September 29, 1953

Considering itself aggrieved by the final judgment of this Court entered on July 14, 1953, The Franklin National Bank, defendant herein, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendant, and that the amount of security be fixed by the order allowing the appeal; and that the material parts of the record, proceedings and papers upon which said final judgment was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Cole, Grimes & Friedman,
Attorneys for Defendant-Appellant.

September 29, 1953.

[fol. 904] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—September 29, 1953

The Franklin National Bank having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on July 14, 1953, and from each and every part thereof, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, Therefore, It Is Hereby Ordered that said appeal be and the same is hereby allowed as prayed for.

It Is Further Ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of \$250.00 with good and sufficient surety, and shall be conditioned as may be required by law.

It Is Further Ordered that citation shall issue in accordance with law.

Edmund H. Lewis, Chief Judge.

September 29, 1953.

[fol. 905] IN COURT OF APPEALS OF STATE OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR RELIEF

The Franklin National Bank, defendant in the above-entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in the prosecution of its appeal from the final judgment of the Court of Appeals of the State of New York entered on July 14, 1953.

The Court of Appeals erred:

1. In holding the New York statute, Section 258 (1) of the New York Banking Law, constitutional against the contention that the statute directly conflicts with the purposes of Congress and the paramount Federal laws, particularly as expressed in Section 24 of the Federal Reserve Act as amended (Ch. 6, §24, 38 Stat. 273; 12 U.S.C. §371) and Section 24 (7) of the National Bank Act as amended (R. S. 5136, 12 U. S. C. §24(7)).

2. In holding and concluding that Section 24 of the Federal Reserve Act neither expressly nor inferentially empowers national banks to advertise or in any way publicize the fact that they may accept "savings deposits", although the statute expressly authorizes national banks to accept such deposits.

[fol. 906] 3. In holding and concluding that national banks, although empowered to advertise the services which they legitimately may provide, must conform their advertising to a state statute which prohibits use of the very words employed in the enabling Federal legislation.

4. In holding and concluding that the defendant engages in "a misleading description" of its business and uses "deceptive verbiage" in characterizing savings deposits as "savings deposits" in its advertising although Section 24 of the Federal Reserve Act so characterizes certain of the deposits which national banks are expressly empowered to accept.

5. In holding and concluding that Section 258 (1) of the New York Banking Law does not, in violation of the Federal Constitution, unduly impede national banks in carrying out their lawful purposes and that the admittedly legitimate national banking activity of taking savings deposits is not substantially interfered with by the state's prohibition of the use of the words "saving", "savings" or their equivalent".

6. In holding and concluding that Section 258 (1) of the New York Banking Law does not unduly discriminate against national banks and handicap them in their competition with savings and loan associations and savings banks.

7. In permanently enjoining the Franklin National Bank of Franklin Square "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public."

[fol. 907] Wherefore, defendant, The Franklin National of Franklin Square, prays that the final judgment of the Court of Appeals be reversed, and for such other relief as the Court may deem fit and proper.

Cole, Grimes & Friedman, Attorneys for Defendant-Appellant.

[fol. 908] Citation in usual form showing service omitted in printing.

[fols. 909-910] Bond on appeal for \$250.00 approved and filed October 5, 1953 omitted in printing.

[fols. 911-913] Statement required by paragraph 2 rule 12 of the rules of The Supreme Court omitted in printing.

[fol. 914] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK, Appellee

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED—filed November 6, 1953

a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court all of the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates the following portions of the record herein for printing by the Clerk of this Court:

(1) The Printed Record on Appeal to the Court of Appeals of the State of New York.

(2) Opinion of the Court of Appeals dated July 14, 1953.

(3) Remittitur of the Court of Appeals dated July 14, 1953.

(4) Judgment of Affirmance dated July 29, 1953, entered in the Supreme Court, Nassau County.

(5) Petition for Appeal.

(6) Order Allowing Appeal.

(7) Assignment of Errors.

(8) Statement of Points to be Relied Upon and Designation of Parts of Record to be Printed.

Samuel O. Clark, Jr., Attorney for Appellant.

[fols. 915-916] CERTIFICATE OF SERVICE (Omitted in printing)

[fol. 917] (File endorsement omitted).

[fol. 918] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—December 7, 1953

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(2215)

**CHARTER NATIONAL BANK OF
SQUAM**

PEOPLE OF THE STATE OF

THE CHARTER OF ATTORNEY OF THE STATE

STATEMENT AS TO FURNISHING

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INDEX

SUBJECT INDEX

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	1
The statutes involved	2
Question presented	2
Statement	3
The question is substantial	5
There is a direct conflict between the state and federal laws	7
The language of the Federal Reserve Act	8
Construction of the Act by Congress	9
Administrative construction of the Act	11
Section 258(1) is discriminatory	13
Section 258(1) unduly interferes with the operations of national banks	15
Conclusion	17
Appendix "A"—Opinion of the Supreme Court of New York, Special Term, Nassau County	19
Appendix "B"—Memorandum Opinion of the Su- preme Court of New York, Appellate Division, Second Department	38
Appendix "C"—Opinion of the Court of Appeals of New York	42
Appendix "D"—Applicable Provisions of certain New York Statutes and of the Federal Reserve Act	50
Appendix "E"—Applicable provisions of certain California and Minnesota Statutes	53
Appendix "F"—A Certified Copy of a Letter, dated July 10th, 1939, from the Deputy Comptroller of Currency to the Attorney General of the State of New York	54

TABLE OF CASES CITED

	Page
<i>Abie State Bank v. Bryan</i> , 282 U.S. 765	16
<i>Costanzo v. Tillinghast</i> , 287 U.S. 341	12
<i>Downey v. City</i> , 106 F. 2d 69, 309 U.S. 590	7
<i>Easton v. Iowa</i> , 188 U.S. 220	7
<i>Farmers and Mechanics National Bank v. Dearing</i> , 91 U.S. 29	7
<i>First National Bank v. Hartford</i> , 273 U.S. 548	10, 14
<i>Inland Waterways v. Young</i> , 309 U.S. 517	16
<i>Jerome v. United States</i> , 318 U.S. 101	8
<i>Pennoyer v. McConaughy</i> , 140 U.S. 1	12
<i>People of the State of New York v. Franklin National Bank of Franklin Square</i> , 200 Misc. 557, 281 App. Div. 757	2
<i>Reconstruction Finance Corporation v. Beaver County</i> , 328 U.S. 204	2
<i>Senn v. Tile Layers</i> , 301 U.S. 468	2
<i>Springfield Institute v. Worcester</i> , 107 N.E. 2d 315, 344 U.S. 884	7
<i>Tiffany v. National Bank</i> , 18 Wall. 409	14
<i>Winters v. People</i> , 333 U.S. 507	2

STATUTES AND OTHER AUTHORITIES CITED

California Banking Code, Section 3394	6
Congressional Record:	
Volume 67:	
Page 2830	10, 11
Page 2839	10
Page 3246-3247	10
Volume 68:	
Page 2170	10
Page 2171	10
Page 2173	10
Page 5815	10
Page 5818	10
Federal Reserve Act, (44 Stat. 1232; 12 U.S.C. 371):	
Section 19	2
Section 24	2, 8, 9, 12

INDEX

iii

	Page
Federal Reserve Board Regulations:	
Regulation D, 12 C.F.R. 204	11
Regulation Q, 12 C.F.R. 217	11
Federal Reserve Bulletin, Volume 1, Pages 18, through 21	11
House Report No. 83, 69th Congress, First Session ..	10
Minnesota Statutes, Title 47.23	6
New York Banking Law, Section 258(1), 2, 3, 4, 5, 13, 15, 17, 18	14
Revenue Act of 1951, Section 313	14
Senate Report No. 33, 63rd Congress, First Session, Pages 27 and 28	9
Senate Report No. 473, 69th Congress, First Session ..	10
Senate Report No. 481, 64th Congress, First Session (Senate Report on the 1916 Amendments to the Federal Reserve Act)	9
Senate Report No. 781, 82nd Congress, First Session, Page 25	14
United States Code:	
Title 12:	
Section 85	10
Section 248	10
Section 371	2, 8, 9
Section 461	2, 11
Section 548	10
Title 18:	
Section 709	8
Title 28:	
Section 1257(2)	2
United States Criminal Code, 62 Stat. 733, 18 U.S.C. 709	8

COURT OF APPEALS—STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,
against

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE,
Defendant-Appellant.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendant-appellant submits herewith its statement disclosing the basis on which the Supreme Court has jurisdiction on appeal to review the judgment of the Court of Appeals of the State of New York entered in this cause.

Opinions Below

The opinion of the court at Special Term is reported in 200 Misc. 557 and a copy is attached hereto as Appendix A. The opinions of the Appellate Division are reported in 281 App. Div. 757 and copies are attached hereto as Appendix B. The opinions of the Court of Appeals have not yet been reported; copies are attached as Appendix C.

Jurisdiction

This appeal is from the final judgment of the Court of Appeals, the highest court of the State of New York from

which a decision in this matter can be had. The judgment is a final judgment and was entered July 14, 1953. A petition for appeal is presented herewith, to wit: on September 29, 1953.

As more particularly appears *infra*, the validity of Section 258(1) of the New York Banking Law was drawn in question on the ground that it is repugnant to the Constitution and laws of the United States and the validity of the State statute was sustained by the Court of Appeals of the State of New York. Therefore, the jurisdiction of the Supreme Court to review on direct appeal is expressly conferred by Title 28, U. S. C., Section 1257(2). The following decisions sustain such jurisdiction: *R. F. C. v. Beaver County*, 328 U. S. 204; *Winters v. People*, 333 U. S. 507; *Senn v. Tile Layers*, 301 U. S. 468.

The Statutes Involved

Section 258(1) of the New York Banking Law and the pertinent provisions of Sections 24 and 19 of the Federal Reserve Act, 12 U. S. C. 371, 461, are quoted in Appendix D.

Question Presented

Is the State of New York empowered to apply Section 258(1) of its Banking Law to a national bank operating in that State and thus prohibit that bank from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public? Otherwise stated, is the State of New York empowered to prohibit a national bank from quoting in its advertisements and in its business dealings with the public the very words of Section 24 of the Federal Reserve Act which expressly authorize national banks to receive and pay interest on "savings deposits"?

Statement

Plaintiff-respondent sued in the Supreme Court of the State of New York to enjoin appellant, a national bank with principal offices in Franklin Square, Nassau County, New York, from using, in violation of the express provisions of Section 258(1) of the New York Banking Law, the word "saving" or "savings" or their equivalent in its business and in its dealings with the public and from soliciting and receiving deposits as a savings bank. By amended complaint, respondent alleged that appellant's use of these prohibited words had deceived the public and had usurped the exclusive rights of State savings banks and savings and loan associations. Appellant's answer, while denying that it practiced any deception, admitted that it had used the words "saving" and "savings" in soliciting savings deposits, and, by way of affirmative defense, alleged that such usage was sanctioned by the relevant federal statutes and the regulations of the Federal Reserve Board. It was further expressly alleged that, in so far as Section 258(1) purported to prohibit national banks from using the word "saving" or "savings" or their equivalent, the State statute was invalid because (a) it directly conflicted with the Constitution and the paramount laws of the United States, (b) it unduly interfered with the operations of national banks located in the State of New York and (c) it unduly discriminated against such banks in their competition with savings and loan associations and savings banks.

Following the trial at Special Term of the Supreme Court of the State of New York, County of Nassau, the trial court specifically held that the appellant had not deceived the public, stating that the allegations in the complaint charging the bank with simulating and holding itself out as a savings bank were completely unfounded. The court

then dismissed the complaint on the merits, basing its decision on the unconstitutionality of Section 258(1).

The Appellate Division, with one judge dissenting, reversed the determination, expressly overruling each of the contentions as to unconstitutionality made by the appellant as alleged in its answer. The court held that the State statute was constitutional and permanently enjoined appellant "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank."

The Court of Appeals, by a vote of five to two, modified and affirmed as modified, the decision of the Appellate Division. The court found no evidence in the record that appellant had solicited and received deposits as a savings bank and accordingly struck from the injunction the language "and from in any way soliciting or receiving deposits as a savings bank." In sustaining the prohibition against the use by appellant of the word "saving" or "savings" in its advertisements and in its banking or financial business in its dealings with the public, the Court of Appeals upheld the constitutionality of the State statute, expressly rejecting appellant's contentions to the contrary.

The evidence produced at the trial demonstrated that appellant and other national banks were in direct competition with savings and loan associations and savings banks for savings deposits and mortgage investments. It was shown that such deposits and investments were solicited through newspapers, periodicals, radio, television, billboards and various other means. It was also proved that savings deposits constituted a substantial part of the total resources of appellant and other national banks and were consequently of vital importance to them. In this respect, it was shown that the ability of national banks to make

mortgage loans depended directly upon their savings deposits and that their earnings were likewise thus dependent. Appellant adduced proof that the substitute terms "thrift account," "compound interest account," and "special interest account" used by national banks, under compulsion of the State statute, to describe their savings deposits are ineffective and misleading. Expert opinions, testimony describing particular situations, relevant statistics and a survey conducted under the supervision of the Psychology Department of Hofstra College were produced to demonstrate factually that, by and large, the public knows what the term "savings" means and that it does not know the meaning of the substitute terms which national banks are compelled to use or that national banks accept savings deposits. It was the opinion of the several bank experts, bolstered by the Hofstra survey and the statistical proof, that the effect of Section 258(1) was substantially to handicap and burden national banks and to discriminate against them in their competition with savings and loan associations and savings banks.

The findings of the trial court at Special Term that there was substantial interference and discrimination were reversed by the Appellate Division which held that "national banks have enjoyed continued prosperity notwithstanding said statute." This finding was concurred in generally by the Court of Appeals.

The Question Is Substantial

This case affects all national banks operating in New York, the question going to the very heart of their business—the solicitation of deposits.¹ The final determination

¹ Attention is called to the fact that the New York State Bankers Association, representing 650 banks and trust companies in New York including 369 national banks, filed a brief *amicus curiae* in the Court of Appeals supporting the position of the appellant.

of this case may also significantly affect national banks located outside of the State of New York. In the first place, the decision may be considered a precedent in the application of restrictive legislation relating to the word "savings" in California and Minnesota (Section 3394 of the California Banking Code and Title 47.23 of the Minnesota Statutes are quoted in Appendix E). While unlike New York, neither California nor Minnesota has prohibited national banks as such from using the word "savings," the sweep of their respective statutes is broad enough to include national banks within the prohibition. In the second place, so long as the decision of the Court of Appeals stands, it will constitute an invitation to other States to adopt restrictive legislation covering advertising or other phases of the operations of national banks which might seriously impair their ability to perform the functions authorized by Congress.

The determination of the Court of Appeals is novel in upholding the right of a State to prohibit verbatim quotation by a duly authorized bank of the pertinent language of an act of Congress specifically authorizing national banks to conduct an important phase of their business. Indeed, the decision of the Court of Appeals can be construed as prohibiting the promotion by New York national banks of payroll *savings* plans inaugurated at the request of the United State Government to further the sale of government bonds. Furthermore, the decision of the Court of Appeals is in direct conflict with administrative rulings of the Comptroller of the Currency and the Federal Reserve Board.

As shown by their opinions, the trial court, one dissenting member of the Appellate Division and two dissenting members of the Court of Appeals held that the New York statute involved was invalid and unconstitutional because it is in direct conflict with the paramount laws of the United States. It is submitted that this difference of opinion is a further

indication of the substantial nature of the constitutional issues involved.

The claim of unconstitutionality rests upon the three grounds alleged in appellant's answer. Each is discussed below.

A. THERE IS A DIRECT CONFLICT BETWEEN THE STATE AND FEDERAL LAWS

The Court of Appeals recognizes that the extent of the powers of national banks are matters of Congressional intent (*Springfield Inst. v. Worcester*, 107 N. E. 2d 315, 316 (Mass.), certiorari denied 344 U. S. 884; *Downey v. City*, 106 F. (2) 69, 73 (C. C. A. 2), affd. 309 U. S. 590; *Farmers & Mechanics National Bank v. Dearing*, 91 U. S. 29, 34). In seeking to determine such intent, however, the court, we submit, committed serious error. It concluded that, since the *State* in enacting the challenged legislation, had determined that the use of the interdicted words was deceptive, *Congress* could not have intended that national banks should use them in carrying on their business. The court thus made the determination of Congressional intent a matter turning upon the motives of the State legislature. In so doing, the court closely followed the reasoning of the Supreme Court of Iowa which was expressly rejected by the Supreme Court of the United States in *Easton v. Iowa*, 188 U. S. 220, 229. As appears immediately below, the Court of Appeals disregarded the legislative history and administrative construction of the Federal Reserve Act and certain amendments thereto and other facts, clearly relevant in the determination of Congressional intent, demonstrating that Congress did intend that national banks might quote the words of the Federal Reserve Act in their business and in their dealings with the public.

1. *The Language of the Federal Reserve Act*

Section 24 of the Federal Reserve Act, as amended (12 U. S. C. 371), specifically authorizes national banks "hereafter as heretofore to receive time and savings deposits." In granting national banks the power to do this type of business, Congress used the word "savings" not once but several times. The appearance of the word in the statute is significant because, as is shown below, its inclusion was deliberate. It is also significant that the grant of the power to receive savings deposits is general and applies to all national banks without limitation. It is a power which may be exercised without reference to the law of any State. The amount which may be received from particular savings depositors, the corporate or individual nature of the depositor, the manner of withdrawal—these phases of the operation of a savings business—are in no way dependent upon any State law. And, most important for this case, the manner of soliciting or designating such deposits is not made dependent to any degree whatsoever on the laws of the various States. Had Congress intended that the laws of particular States should apply, it obviously would have so provided—as it did by the provision in Section 24 that the rate of interest payable on such "savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located." The rule of *expressio unius exclusio alterius est* would appear to be applicable. Likewise applicable is the general assumption that Congressional acts are deemed to have general application and are not dependent upon State law unless there is plain indication to the contrary. (*Jerome v. U. S.*, 318 U. S. 101, 104.)

Significant in this connection are the provisions of the United States Criminal Code (62 Stat. 733; 18 U. S. C. § 709) relating to advertising by banks and others. The

use by unauthorized banks of certain terms in advertising is there expressly enjoined. But no prohibition appears against the use by national banks of the word "savings." Nor is the method of soliciting deposits or the use of the word, or any other word, made dependent upon State law.

Respondent admits that national banks may advertise. It nevertheless claims that the language most appropriate—the very words used by Congress—may not be employed. Consequently, appellant cannot advise the public that it is authorized to and does receive savings deposits. In addition, since the State statute expressly prohibits the use of language equivalent to the word "savings," any words which appellant might be forced by the State statute to use to attract savings deposits would necessarily be inaccurate and consequently misleading.

2. *Construction of the Act by Congress*

Congress specifically amended the Federal Reserve Act in 1927 to authorize national banks to "continue hereafter as heretofore to receive time *and savings deposits* and to pay interest on the same" by adding the words "and savings deposits" (44 Stat. 1232; 12 U. S. C. 371). This specific authorization recognized that national banks had been accepting savings deposits for some time. That Congress was aware of this fact is clearly indicated by the legislative history of the 1913 Federal Reserve Act and amendments thereto. Thus, the Senate Report on the original Federal Reserve Act stated that "national banks now, through the system of time deposits, carry on a savings-bank business." (S. Rept. No. 33, 63rd Cong., 1st Sess., pp. 27-28. See also the Senate Report on the 1916 amendments to the Federal Reserve Act. S. Rept. No. 481, 64th Cong., 1st Sess.)

The legislative history of the 1927 amendments makes abundantly clear that Congress' use of the words "savings deposits" was not, as alleged by the Court of Appeals,

"merely descriptive of a well-known type or kind of bank deposits," but was a specific authorization to national banks to receive savings deposits and make real estate loans in full and open competition with all types of banks, including State mutual savings banks. (H. Rept. No. 83, 69th Cong., 1st Sess.; S. Rept. No. 473, 69th Cong., 1st Sess.; 67 Cong. Rec. 2830, 2839, 3246-3247; 68 Cong. Rec. 2170, 2171, 2173, 5815.)² In addition, national banks were granted broader power to invest in real estate mortgages. The amendments also granted branch banking rights to national banks on the same basis as State banks, including mutual savings banks. Nothing has appeared in subsequent legislation by Congress dealing with the Federal Reserve Act which has changed this stated purpose of the 1927 amendments.³

² Perhaps the most pointed expression of the underlying Congressional purpose of the 1927 amendments was made by Congressman McFadden, who introduced and sponsored the bill. After the amendatory legislation had been enacted into law, he said:

"As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal Reserve System.

.

"First, section 16 amends section 24 of the Federal reserve act and authorizes a national bank by statutory enactment to carry on a savings bank business and lend money on the security of real estate." (68 Cong. Rec. 5815, 5818; emphasis added.)

³ Further evidence of the underlying intent of Congress to place national banks in a competitive position with State savings banks and other financial institutions may be derived from the fact that national banks were authorized to charge interest on loans at the rate allowed State banks, except that, if the State permits others to charge a higher rate, national banks may receive the higher rate (12 U.S.C. 85). National banks may also act as fiduciaries in any State which grants similar powers to State banks, trust companies or other corporations which compete with national banks (12 U.S.C. 248). While Congress permits the States to tax the shares of stock of national banks, the rate may not exceed that on "other moneyed capital" employed in competition with them whether they be banks, corporations or individuals (12 U.S.C. 548; *First National Bank v. Hartford*, 273 U.S. 548, 557-558).

3. *Administrative Construction of the Act*

Since Congress intended to improve the competitive position of national banks, its deliberate inclusion in the 1927 amendments to the Federal Reserve Act of the right to receive "savings," although national banks already were receiving such deposits,⁴ is of prime significance, particularly when considered in light of the long maintained position of the Federal Reserve Board that the States could not forbid national banks to advertise for savings deposits. The Board's administrative position on this issue was first published in 1915 in a ruling dealing with a California statute, which, like the New York statute involved in this case, prohibited the use of the word "savings." The Federal Reserve Board held that, since national banks possessed the power to receive "time deposits" which were defined to include certain "savings accounts," the right to advertise for such accounts would seem to be a necessary incident to the exercise of that power and that, consequently, the California statute could not be enforced against them (1 Fed. Res. Bull. 18-21).⁵ Therefore, the

⁴ Indeed, Congressman McFadden, in discussing the 1927 amendments on the floor of the House of Representatives, stated:

"* * * There are on deposit to-day in the national banks a total of savings deposits to an amount of \$6,000,000,000, which is about one-fourth of the entire sum held on savings deposits by all banks in the United States. There are nearly 12,000,000 individual savings depositors in national banks, constituting nearly one-third of all of the persons carrying money in savings deposits in all banks. These figures do not include commercial time deposits, but strictly savings." (67 Cong. Rec. 2830.)

⁵ The Federal Reserve Board has, pursuant to Section 19 of the Act (Appendix D), defined the term "savings deposit" for the purpose of determining reserve requirements of bank members of the Federal Reserve System (Reg. D, 12 C.F.R. 204) and fixing maximum interest rates (Reg. Q, 12 C.F.R. 217). As thus defined, and in no other way, has the Board used the word. And since all national banks are members of a Federal Reserve Bank, the definition applies to appellants as to all other national banks (12 U.S. C. § 461).

well-established rule of statutory construction—that an administrative determination left undisturbed by Congress must be deemed approved by Congress, even if the court itself “doubted the correctness of the ruling” (*Costanzo v. Tillinghast*, 287 U. S. 341, 345)—should have been observed by the Court of Appeals. A finding by the Court of Appeals that Congress had approved the administrative determination and had intended, by necessary implication, to authorize national banks to advertise for savings deposits would have resulted in a holding that there was a conflict between the two statutes, and that Section 258(1) of the New York Banking Law was unconstitutional in so far as it applied to national banks.

In addition to the ruling of the Federal Reserve Board discussed above, the Comptroller of the Currency has expressly ruled on the precise question here involved. Under date of July 10, 1939, the Comptroller sent a formal opinion to the Attorney General of New York stating, with detailed supporting reasoning, that national banks in New York were empowered to use the words prohibited by the State statute. (The opinion of the Comptroller of the Currency is attached hereto as Appendix F.)

The interpretation of Section 24 of the Federal Reserve Act by the Federal Reserve Board and the Comptroller of the Currency are entitled to great weight. And in a situation such as the present one, where there is no statutory indication that they are incorrect, where they have been consistently adhered to and followed for thirty-eight years with no dissent, they are “entitled to great respect and should ordinarily control the construction of the statute by the courts” (*Pennoyer v. McConnaughy*, 140 U. S. 1, 23. See particularly: *Inland Waterways v. Young*, 309 U. S. 517, 524). The failure of the Court of Appeals to give any weight to these rulings, which were urged upon that court,

t them in direct conflict with the court's decision. This conflict further highlights the substantial nature of the question here involved.

In determining that there is no conflict between the state statute and federal law, the Court of Appeals asserted that the State of New York is merely forbidding a misleading description of appellant's business which, the State insists, would lead the public to believe that appellant is a mutual savings bank. Yet the Court of Appeals endeavored to explain the use by Congress of the word "savings" as being merely "descriptive of a well-known type or kind of bank deposits." This reasoning is difficult to follow. If, as the court states, the words of the federal statute are descriptive of the type of account which appellant handles, appellant's use of these very words to describe such accounts can hardly be deceptive. And the fact that the Court of Appeals specifically held that there was no evidence that appellant had intended to solicit and receive deposits as a savings bank is conclusive that it did not mislead the public into believing that it is a mutual savings bank. Furthermore, it is pertinent to inquire how the words used by Congress can connotate "mutual savings bank" when the State statute expressly permits their use by savings and loan associations and trust companies, the stock of which is owned by savings banks? And if, as the court concludes, the words are merely descriptive, why would Congress add the term "savings" to the statute in 1927 when the words "time deposits"—which were defined to include "savings deposits"—were already in the statute and had been since 1913?

B. SECTION 258(1) IS DISCRIMINATORY

In the instant case the trial court expressly found that national banks are in direct and keen competition with savings banks and savings and loan associations for savings

deposits.⁶ This finding was not reversed or even questioned by the Appellate Division and the Court of Appeals. To the extent, therefore, that the State statute prohibits national banks from advertising for "savings," while, at the same time, permitting savings banks and savings and loan associations freely to do so, it improperly discriminates against national banks. And this discrimination is emphasized by the fact that the statute not only prohibits national banks from using the words "saving" or "savings," but also prohibits the use of any "equivalent." Such discrimination, it is clear, is an evil which, as shown above, the federal statutes equalizing competition with State banks and State financial institutions were designed to prevent (*First National Bank v. Hartford*, 273 U. S. 548, 557-559; *Tiffany v. Nat. Bank*, 18 Wall. 409, 412).

The Court of Appeals did not answer the defendant's contentions regarding the discriminatory nature of the State statute but merely pointed out that there are differences between commercial banks and mutual savings banks. The Appellate Division, however, expressly stated that the State law was not discriminatory because the statute applied to all commercial banks, both State and national. Savings banks, it said, operated under different conditions and, therefore, could be constituted a separate class entitled to different treatment.

⁶ The existence of such competition was recently confirmed by Senate Report No. 781, 82nd Congress, First Session, made in connection with legislation (Section 313 of the Revenue Act of 1951) which amended the Internal Revenue Code to subject savings banks and savings and loan associations to income taxation. The Senate Finance Committee reported, page 25:

"At the present time, mutual savings banks are in active competition with commercial banks and life insurance companies for the public savings, and they compete with many types of taxable institutions in the security and real estate markets. As a result your committee believes that the continuance of the tax-free treatment now accorded mutual savings banks would be discriminatory."

We submit that the question is not, as the court indicated, whether a savings bank or a savings and loan association is a different type of institution from a national bank. The significant fact is that, in an important phase of their respective operations, viz., the obtaining and investment of savings deposits, savings banks and savings and loan associations are in direct competition with national banks. The New York statute by denying national banks a right which it grants savings banks and savings and loan associations has weighted that competition in favor of state institutions and has discriminated against national banks.

C. SECTION 258(1) UNDULY INTERFERES WITH THE OPERATIONS OF NATIONAL BANKS

The Court of Appeals recognized the rule that State laws which substantially hamper national banks are invalid. It concluded, however, that Section 258(1) did not substantially interfere with the operations of national banks in advertising for and receiving savings accounts. The court pointed out that the present New York law was "nearly a half century old" and that other national banks, by resorting to the use of terms synonymous with "savings" such as "special interest account," "thrift account," "compound interest account," did not "seem" to have suffered seriously harmful effects.⁷ It found that the number of savings accounts in national banks had increased and that national banks "have enjoyed continued prosperity."

⁷ In stating that other national banks had "complied" with the State law, the Court of Appeals apparently overlooked the fact that Section 258 (1) interdicts the use not only of the terms "saving" or "savings" but also their equivalent. If, as the Court of Appeals stated, the expressions "special interest account," "thrift account" and "compound interest account" are "synonymous" with "savings account," they must necessarily be equivalent. Apparently the Attorney General of the State of New York has tolerated for many years this apparent violation by national banks of the letter, if not the spirit, of the law. The Attorney General of the State of New York has issued no ruling or opinion that the use of these

In contrast to these generalized conclusions, it is important to consider the evidence of record and the findings of the trial court. It was proved that savings deposits constitute a large proportion of the total deposits and assets of national banks. The amount which such banks are permitted to loan on the security of real estate mortgages depends on the amount of savings deposits and the amount of their earnings is also substantially affected by the amount of such deposits. The trial court found that the receipt of savings deposits is "a necessary element in enabling defendant to prosecute its banking business," a finding not disturbed on appeal.

The prohibitions contained in the New York statute compel the national banks to call their savings deposits "special interest accounts," "thrift accounts," and "compound interest accounts."⁸ The result has been great confusion on the part of the customers of the banks and the public generally. The existence of such confusion was fully supported by the "Hofstra" survey which was admitted in evidence by the trial court and furnished statistical proof that the substitute words forced on national banks were not understood by the public, whereas the public does understand the meaning of the term "savings account."⁹ This confusion has resulted in the loss of savings accounts and

substitute expressions forced upon other national banks does not constitute a violation of the statute. And his continuing inaction gives but little assurance that he may not on any day attempt to enforce the statute as it has been written, notwithstanding the *dictum* appearing in the opinion of the Court of Appeals in the instant case.

⁸ There is no proof in the record to support the statement of the Court of Appeals that *all* national banks in New York except appellant have complied with the State statute. Even if such proof had been offered, it would clearly be irrelevant. (*Cf. Abie State Bank v. Bryan*, 282 U.S. 765, 772, 775, 776.)

⁹ For example, this survey showed that over 85% of the public know what a "savings account" is, but only 7% understand the meaning of "thrift account."

substantial interference with the operations of national banks.

National banks, in keen competition with savings banks and savings and loan associations, must be able effectively to inform the public of their ability and desire to receive and pay interest on savings accounts. It is at this crucial point that Section 258 (1) intervenes with its prohibition against the use by national banks of the word "savings" in advertising or in their dealings with the public.

In the light of the actual effects of the operation of Section 258 (1), the conclusion of the Court of Appeals that the savings accounts of national banks have increased and that they have enjoyed continued prosperity becomes largely irrelevant. Obviously, savings deposits might increase and earnings continue even though the statute operated directly to handicap national banks. It is elementary that the business might grow—even prosper—despite the existence of heavy burdens and handicaps. The facts are not inconsistent. Thus, it was shown at the trial of this case that the dollar increase in savings deposits was due to an increase of money in circulation and to inflation and that savings in national banks have substantially decreased in relation to demand deposits. Significantly, appellant demonstrated statistically that savings deposits in national banks have decreased in relation to savings deposits in savings banks and savings and loan associations. The consequence is clear: general statements regarding growth and prosperity of national banks do not prove that the State statute does not substantially burden or interfere with their business.

Conclusion

The determination of the Court of Appeals of New York leads to the extraordinary result that the mere verbatim quotation by a national bank of the relevant language of

the Federal Reserve Act in the due course of its business subjects the bank, without more, to civil penalties under a State statute. This statute—Section 258 (1) of the New York Banking Law—encroaches on the power and interferes with the operations of national banks and discriminates against them. The Court of Appeals has upheld the validity of the State statute, overruling the contention that such statute is repugnant to the Constitution and laws of the United States. We believe that the question is substantial and of public importance. We respectfully submit that the Supreme Court of the United States has jurisdiction on direct appeal to review the judgment of the Court of Appeals of the State of New York entered in this cause.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF NEW YORK, SPECIAL TERM, NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiff*,

v.

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, *Defendant*

Supreme Court, Special Term, Nassau County, May 29,
1951

CUFF, J.:

The question before this court is the constitutionality of a statute of the State of New York. By means of a properly instituted proceeding, the New York Attorney-General, in the name of the People of the State of New York, seeks an injunction against defendant, the Franklin National Bank of Franklin Square, Nassau County, New York, a corporation organized and existing under the National Bank Act of the United States, restraining it from using the words "saving" or "savings" in its publicity and from holding itself out as a savings bank. Plaintiff bases its suit upon subdivision 1 of section 258 of the New York Banking Law, which reads as follows:

"No bank, trust company, *national bank*, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, *national bank*, individual, partnership, un-

incorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued." (Emphasis supplied.)

The complaint alleges: that defendant is a national bank organized and existing under the National Bank Act (U. S. Code, tit. 12 § 21 et seq.); that subdivision 1 of section 258 of the New York Banking Law prohibits defendant from using "saving" or "savings" or their equivalent in its business or in soliciting or receiving deposits as a savings bank; that since 1947, defendant has been using "saving" and "savings" in its business; that it has solicited accounts by forms of publicity in which it has used the words "saving" and "savings"; that such use of those words was calculated to and did lead the public to believe that defendant was a savings bank "with all attendant safeguards and benefits" (par. 6); that the use of "saving" and "savings", "as aforesaid", violated said subdivision 1 of section 258 of the New York Banking Law; that although the Banking Department demanded that defendant desist using those words, defendant refuses to do so; that plaintiff has no adequate remedy at law. Plaintiff demands a permanent injunction against defendant restraining it from using the words "savings" or "saving": (1) in its advertising; (2) in its banking or financial business, and (3) as it holds itself out as a savings bank, by the use of a sign, or in its soliciting or receiving of deposits.

The answer admits: that defendant exists by virtue of the laws of Congress (U. S. Code, tit. 12, § 21 et seq.); that it is not authorized to do business or hold itself out as a savings banks; that it has been using "saving" and "savings" in its business since 1947 to solicit savings accounts; that it has refused to discontinue its use of those words, although the New York Banking Department has demanded that it desist; that in its use of those two words, it did not try to lead the public to believe that it was a savings bank, nor does the public so believe. For a complete defense, defendant alleges that subdivision 1 of section 258 of the New York Banking Law is unconstitutional

and void insofar as it purports to relate to defendant and national banks because: (a) it conflicts with the Constitution and laws of the United States; (b) it unduly interferes with and hinders the operations of national banks and defendant, frustrating them in accomplishing the purposes for which they were organized, and (c) it discriminates against defendant and national banks, handicapping them substantially in their competition for savings deposits with savings banks and savings and loan associations.

The allegations in the complaint charging defendant with fraudulently simulating a savings bank and fraudulently holding itself out as a savings bank, were wholly unsupported by evidence at the trial. Defendant offered proof that when its bank was remodeled, the architect and builder were instructed to erect a building which resembled not a savings bank, but a department store and that was done (717). Those charges, I find on the evidence, were completely unfounded; they are dismissed.

The issue at bar is not one of wrongdoing. The Attorney-General seems to acknowledge that by not seeking to recover the penalty of \$100 a day which subdivision 1 of section 258 provides for its violation. This case tests the power of the State to legislate as it has (Banking Law, § 258, subd. 1) with relation to national banks. The Attorney-General believes it has that power, while defendant is convinced that it has not.

Defendant has openly employed the words "saving" and "savings" as it publicizes the fact that it may receive from the public "savings deposits" in the belief that the State has no control over its use of those words. The defendant relies upon certain provisions found in the Federal Reserve Act, which read in part as follows: national banks may "continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State Banks or trust companies organized under the laws of the State in which such association is located." (U. S. Code, tit. 12, § 371.)

I will treat with the evidence adduced at the trial. (Numerals in parentheses refer to the stenographer's minutes.)

The proof offered by plaintiff need not be detailed, because defendant admits all of the facts upon which plaintiff rests its case. It challenges only the motives ascribed by plaintiff that defendant sought to represent itself as a savings bank. Defendant offered proof to negative that deception charge in the complaint. I admitted that evidence (although no proof of intent to deceive had been submitted by plaintiff) only because plaintiff proved and defendant admitted that defendant used the words "savings" and "saving" in its publicity, and I felt that defendant was entitled to show that its motives in so doing were marked by good faith. I have disposed of the fraud angle of this litigation; it will not again be referred to.

Returning to the subject of evidence offered by defendant, several presidents and other officers of national banks, including Arthur T. Roth, the president of defendant bank, testified. The experience and long service of these men in the banking world were not questioned. They said compositely that deposits in national banks were of two types—demand and savings; that the latter, interest-bearing deposits, were received, recorded and handled through a separate department of the bank; that the demand accounts were the usual deposits received by any commercial (as distinguished from savings) bank; that savings deposits were indispensable to the maintenance of their respective banks (728-729); that they (except defendant since 1947) refrained from using the words "savings" or "saving" in their business, unwillingly, out of deference to the prohibition contained in subdivision 1 of section 258 of the New York Banking Law (152, 154, 210, 217); that instead of those words they used, perforce, the terms "thrift", "compound interest" and "special interest" in their signs, records (deposit slips and pass books) and publicity in describing their savings department and in making known that they had the legal right to receive savings deposits (152, 210, 236); that having to use those substitutes hampered them in attracting savings deposits (121, 210, 211, 213, 238); that they rated the handicap accordingly imposed upon them as

definitely handicapped" (151) "stumbling block" (226) "considerable handicap" (239, 242), "detrimental" (239) "emendous" (236) and similarly; that there was only one savings bank—the Roslyn Savings Bank—in Nassau County; (this court takes judicial notice of the fact that that bank is not centrally located in Nassau County; nor is it in or reasonably near any of the larger business or congested centres and is rather inaccessible thereto by means of transportation except automobile).

To continue the resume of the testimony of defendant's witnesses, they testified that the said Roslyn Savings Bank advertised to no great extent; that New York City savings banks (Nassau County is adjacent to New York City) and its savings and loan associations, as well as Nassau County savings and loan associations, advertise extensively (209) and aggressively for savings deposits through the media of newspapers, direct mail, periodicals, radio and other sources, putting defendant and national banks at a disadvantage in the competition for savings deposits because they emphasize the word "savings" (210); that demand deposits compare with savings deposits in their respective banks as follows: John R. Evans, president of the First National Bank of Poughkeepsie for ten years, a banker of twenty-seven years (139-141) stated that 40% of the total deposits were savings (161); Augustus B. Weller, a banker for twenty-nine years, president for seventeen years of Meadowbrook National Bank with two branches in Nassau County, testified that in 1934 the savings accounts totaled twice the demand accounts (215) while currently, the demand accounts are \$15,000,000 as compared with savings accounts of \$12,000,000 (219); that that ratio (about five to four demand over savings deposits) has been maintained in recent years (219-220); William H. Abel, president Central National Bank of Mineola (although only recently made president, Mr. Abel had been executive vice-president for five years and affiliated with the bank for twenty-one years) testified (233) that prior to 1950 demand deposits were \$4,000,000, savings \$3,000,000 (244); Mr. Roth, president of defendant, testified that from 1941 to 1948 savings deposits exceeded demand deposits (726) but since 1948 the reverse is true, to wit: 60% demand, 40% savings (738);

John J. Keuthen, president of Wheatley Hills National Bank since 1936 testified that if questioned his answers would have been substantially the same as the other bank officials with the modification that whereas they state that their savings deposits totals have increased in recent years, his bank has not enjoyed that condition but on the contrary, since 1948, his savings deposits have decreased (259).

The cross-examination of the bank officials did not alter the figures given or opinions expressed. Plaintiff's counsel in each instance, developed the point that the bank of which the witness was an officer bettered its deposit position progressively in recent years. But that development, the witnesses said, was not peculiar to Nassau County or even New York State. (153, 154, 221, 222, 226, 251). Inflation, I would say, could be a contributing factor to that condition. I do not think that that general increase in deposits in banks bears upon the problem at bar.

It was stipulated that the testimony of two other bank officials, who were in the courtroom, if called to the stand, would have been substantially the same as that given by the bank officials who had already testified, with the reservation that plaintiff was not conceding the correctness or truth thereof.

Mr. Evans (First National Bank of Poughkeepsie) made the important disclosure that his bank derived more profit from savings deposits than it did from demand deposits (161).

Defendant also introduced evidence concerning a sample poll to show the public understanding of the following terms: "savings", "thrift", "compound interest", and "special interest" as they relate to bank accounts (278). The object of the defense in introducing this evidence was to demonstrate that the term "saving account" is well understood by the public; that when disposed to open a bank account, the public reacts to the power of suggestion which the word "savings" generates and turns to the savings bank with its business; that the three terms which defendant and other national banks are forced in their publicity to substitute for "savings" are not well understood and do not attract depositors in anything like the numbers that the word "savings" does.

This poll was planned and executed under the auspices of Hofstra College, a well-known and highly regarded institution of higher learning with 3,800 students studying the arts, sciences, etc., located at Hempstead, Nassau County, New York. Although defendant paid for the services rendered, the college was actually retained by the Nassau Clearing House Association (277), an organization consisting of all except a few of the Nassau County banks, which serves the common interests of its members (203, 204). The work of the poll was assigned to the psychology department of Hofstra. Its planning and setting up came under the jurisdiction and guidance of Matthew Chappell, professor of psychology at Hofstra and chairman of the department of psychology (278). He worked continuously on the task from beginning to end. His experience, education and knowledge are important in appraising the evidentiary value, if any, to be ascribed to the poll, because he was the key figure. His history, appearance and manner indicate that he is a highly educated person; he has spent much of his life in the educational field, which has included sampling of public opinion; his work has made him a diplomat of the American Board of Examiners in professional psychology (281); while teaching at Columbia University of New York City, he engaged in research work in the field of "public opinion and mass buying behavior" and since 1938 has continued that study (264-265); he worked about two years (1938-1940) with Psychological Corporation in the market and social research division, making use of polling techniques in business and industry; he was employed (1940-1943) by C. E. Hooper, Inc., the firm which conducts the so-called "Hooper Rating" polls; he maintained his own office (1943-1947) as a consultant, conducting polls for business and industry (265); he wrote books on psychology and collaborated with Mr. Hooper, aforementioned, in writing a book entitled "Radio Audience Measurement" (266); since 1938 he has actively participated in from 50 to 100 polling activities to ascertain the public mind on different subjects (269).

Mr. Chappell was aided, as his immediate assistant, by Richard Brumbach, a professor of Hofstra's psychology department (560) and an associate director of its psycho-

logical workshop (561). He had experience relating to polls—their planning, execution and analyses (1945-1950) with a research company (562-563). The field workers were senior students at Hofstra and the others who collaborated on the poll were of its faculty. All persons who participated were paid for their services (644).

This poll is known in the art as “probability sampling” (292). The testimony reveals that it was meticulously planned, executed and analyzed. (266, et seq.) The objective of those who set it up was to query adults residing in Nassau County without *any person* exercising judgment in the selection of those to be interviewed (276, 292). The identities of the interviewees were arrived at solely by a mathematical process (289). The result was a strictly random selection of them (276). By the processes adopted, considered the best method in the sampling art (277), all human judgment in the choice of interviewees—which may control the results of a poll (294) was eliminated (237). One of the objectives of the poll—and an important one—was to afford to every adult member of the population of Nassau County, an equal chance, with all other adults, of becoming an interviewee (289). I find that that ambition was closely approached by reason of the careful, intelligent, unbiased application of those in charge. The same kind of unprejudiced and careful methods, which marked the planning and supervision, were pursued in the actual interviewing (288, et seq., 423-440). Mr. Chappell knew that defendant paid the expenses for the taking of the poll (372) but he did not know that the poll was to be used in a law suit until after the work had been completed and the poll and its results had been presented to defendant (646). Not only those who planned and supervised the poll testified but also two of the interviewers were witnesses (423-440). Upon defendant’s counsel’s statement that he had eighteen other workers (interviewers) in court ready to testify, a stipulation was entered into by counsel that if the others (the eighteen) testified, that their testimony would be substantially the same as the two who had testified without plaintiff’s conceding the accuracy or truth of same (441).

The poll produced the following results: only 15% *did not know* the meaning of the term “savings account”, while

53.3%, 62.7% and 52.7%, respectively, *did not know* the meaning of the terms "compound interest account", "special interest account" and "thrift account". Only 19.5% gave an accurate statement as to the meaning of "thrift account", 21.4% as to "special interest account" and 40.8% as to "compound interest account". In this compilation, full credit for accuracy was given to answers to the effect that the meaning of the substitute terms was the same as "savings account".

Without regard to actual percentages, the answers develop the point which this court has appreciated all along by reason of common knowledge, viz: that the public understands the meaning of the term "savings account", for what it really is, far better than it understands the meaning of any of the substitute terms. I am also satisfied, based upon all the proof herein and judicial notice, that the word "savings", when used with the word "account" in relation to a bank, provokes a much stronger appeal to the eye and understanding of the public than do the substitutes, when placed before persons disposed to open an interest-bearing bank account.

Polls, as evidence, are not controlling, of course. Many are misleading; valueless.

The learned deputy attorney-general vigorously opposes the consideration or even the admission of the poll evidence, as hearsay and not within any exception to the well-known rule. Both sides have briefed the question. The use of polls as a test of public opinion by business, newspapers, periodicals and others is growing; already it is widespread (295). There is no doubt that that testimony which is usually called "hearsay" has formed part of the proof at bar. The Attorney-General argues that the answers of those interviewed as reported by the interviewers, upon which the poll rests for its usefulness, in particular, are pure hearsay. On that point Jerome Prince in his recent (1948) revision of *Richardson on Evidence* (7th ed.) calls that kind of proof original evidence. He says: "Where the mere fact that a statement was made, as distinguished from its truth or falsity, is relevant on a trial, evidence that such statement was made is original evidence and not hearsay." (§ 246.) This proffered proof (the answers) is testimony

that the interviewees made the answers to the questions which the witnesses swear they asked them. It is no more than that. A court accepts or rejects in whole or in part *as a fact* that answers were made as reported by the witnesses, depending upon the reliance that the court places on the testimony of the witnesses. The value of the answers as evidence is something else. But that the answers were made can be a fact. The weight to be given to the answers would depend upon the poll itself. That returns us to the question of whether the poll proof should be received in evidence at all.

A party endeavoring to establish the public state of mind on a subject, which state of mind can not be proved except by calling as witnesses so many of the public as to render the task impracticable, should be allowed to offer evidence concerning a poll which the party maintains reveals that state of mind. The evidence offered should include calling the planners, supervisors and workers (or some of them) as witnesses so that the court may see and hear them; they should be ready to give a complete exposition of the poll and even its results; the work sheets, reports, surveys and all documents used in or prepared during the poll taking and those showing its results should be offered in evidence, although the court may desire to draw its own conclusions. In this trial the learned counsel for defendant adduced proof of the kind to which I have just referred. I think that the proof as to the poll should be received in evidence. I also am satisfied that the conclusions drawn therefrom are worthy of some consideration. Plaintiff's objections to the admission of this proof are overruled.

There is a difference between savings banks and commercial banks including national banks (*Bank of Redemption v. Boston*, 125 U. S. 60). The savings bank has no stockholders. It is owned, if owned at all, by the depositors; total amount that each depositor may deposit is limited; its officers are their employees whom they appoint to receive and invest their deposits which are to be returned to them with the earned interest upon reasonable demand. There are no profits, as such. Profits, if any, ultimately are returned to the depositors in the form of interest. The investments made by their officers are circumscribed. They

may make no commercial loans (loans on unsecured notes or notes secured by personal property other than "legal investments"); the amounts of their mortgage loans on realty are surrounded by statutory restrictions referable to the appraised value of the pledged realty, its location, the nature and age of the improvement thereon, amortization arrangements, duration of loan and stability of borrower (Banking Law, § 235, subd. 6).

The commercial (national) bank is owned by its stockholders. Its officers are the employees of the board of directors, who in turn are the elected representatives of the stock. Those officers are expected, in managing the bank, to produce profits, which go to the stockholders in the form of ordinary dividends. A commercial bank may make, in the exercise of the sound judgment of its officers, unsecured loans and loans secured by personalty, which may even be merchandise. There is no limit upon the total amount it may receive from each depositor. It may provide money on mortgage loans like the savings bank based upon the appraised value of the pledged realty, but there are not the other rigid restrictions which are imposed upon savings banks (U. S. Code, tit. 12, § 371). While national banks receive and record their savings deposits separately from their demand deposits, both are pooled and provide one working fund. Thus savings deposits control as much as demand deposits, the volume of lending and investing in which national banks indulge.

It has been said that the savings bank is a semipublic institution; that the State in its wisdom seeks to encourage those who will save, particularly in small amounts; that the State has furnished a haven for the thrifty. I do not wish to cast the slightest reflection upon commercial banks and their stability when I say that the legislation with respect to savings banks enacted by this State over the years was unmistakably intended to render the savings bank as safe and sound as laws could, to the end that those small depositors, encouraged as I have said to save, would run the least possible risk of losing their funds, and, incidentally, would receive as much interest as safety would permit. The powers and discretion of the officers of savings banks are indeed narrow and circumscribed.

The New York State Legislatures, enacting laws from time to time, were always seeking to protect deposits in savings banks, it would seem, solely for the benefit of the depositors, to assure each depositor as far as laws could assure, that his or her deposit would always be available upon reasonable demand. That legislation, however, was enacted and the decisions in harmony therewith were written before the National Government insured bank deposits in *all banks*—Federal and State—up to \$10,000 (Public Law 797, ch. 967, enacted Sept. 21, 1950). Ten thousand dollars is the limit which a savings bank may accept from any one depositor (L. 1951, ch. 592).

As the matter stands today, all deposits in national banks are insured by the United States Government in exactly the same way as deposits in savings banks are insured, by the United States Government. In the light of this development, has not one of the principal reasons for the studied protective legislation referable to savings banks, including subdivision 1 of Section 258, and the protective attitude of the courts in their reflective decisions become academic? Is that arm of State protection to reassure bank depositors needed any more?

Prompted by its traditional zeal to clothe its savings banks with the ultimate in known safeguards against financial loss by depositors the State of New York, due to its more recent enactment (§ 258, subd. 1) has extended itself to the point where it stands accused by the defendant herein of attempting to preempt certain fields of the banking business essential to the National Government in maintaining its system of banking (U. S. Code, tit. 12, § 371) and by this suit the State seeks to judicially eject from those fields an important cog in that system, albeit a creature of the United States Government—the national bank.

Giving appropriate consideration to the evidence adduced herein by defendant, which proof is either not disputed or not successfully challenged, it is evident that subdivision 1 of Section 258 of the New York Banking Law and Section 371 of the Federal Reserve Act cannot be read together in harmony. There is a violent conflict of legislative authority. We are obliged to ascertain the extent of that

lash and the damage. Is there impairment, hampering, embarrassment or restriction exerted upon national banks by the New York statute, as they endeavor to achieve the objectives which Congress contemplated for them? If there is, that is a fatal legislative transgression by a State law (*First Nat. Bank v. Commonwealth*, 9 Wall. [U. S.] 353, 362; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 283; *McClellan v. Chipman*, 164 U. S. 347; *Waite v. Dowley*, 94 U. S. 527, 533).

In specific terms, what does the New York statute seek to accomplish? The answer to that question will expose the inroads of the State statute, if any, upon the Federal grant of power to national banks to receive "savings deposits". The statute may be divided into three, as far as this litigation goes, parts. The first part provides that "No . . . national bank . . . shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business". The second part provides that no national bank shall make use of the equivalent of "saving or savings" in relation to its banking or financial business. The third part forbids national banks "in any way [to] solicit or receive deposits as a savings bank". (Banking Law, § 258, subd. 1; italics supplied.) I will discuss the third part first. A national bank is not a savings bank. Nevertheless, Congress has granted it the power to solicit and receive "savings deposits" (U. S. Code, tit. 12, § 371.) Obviously any national bank (the defendant is one) availing itself of that power, will provide space and facilities within its walls where such deposits may be made by the public and be received by the bank. That particular part of the bank of necessity will give off an air of sanctuary where savings are to be banked. To that extent the national bank would assume some of the attributes typical of an institution where savings are ordinarily deposited. I cannot perceive how such a situation could be avoided, if the national bank is to receive "savings deposits". Could it be that the authors of subdivision 1 of section 258 of the New York Banking Law intended to render that inevitable situation a violation of that law and to subject the national bank which, perforce gave it expression, to the prescribed penal-

ties? The provision "nor shall" a national bank "in any way solicit or receive deposits as a savings bank" (§ 258, subd. 1), I consider refers to a national bank simulating a New York savings bank for purposes of deception (*People v. Binghamton Trust Co.*, 139 N. Y. 185, 190). The element of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto. Therefore, the "third" part of subdivision 1 of section 258 may be disregarded.

But the "first" and "second" parts of the statute are different. To begin with, defendant admits violating those provisions. I find that those parts of the law apply with directness and force to this case. As far as the issues herein presented are concerned, however, the provisions of the law which I have designated "first" and "second" parts may be considered together. The language would seem to be restrictive, confining its prohibitions to those occasions only when a national bank is engaged "in its banking and financial business" (§ 258, subd. 1), but when the nature of the provisions is considered, the prohibitions are actually all inclusive, because only when a national bank is engaged "in its banking and financial business" does it receive "savings deposits" and does it have reason to use the forbidden words "saving" and "savings". Inferentially, subdivision 1 of section 258 forbids a national bank, *inter alia*, to use those words or their equivalent:

(1) in its display of signs on its own premises:

(a) even to indicate its right to receive "savings deposits";

(b) even for directional purposes to guide its customers to the place where "savings deposits" may be received;

(c) even to designate the proper window for such depositing;

(d) even to print the words "savings deposits" on its deposit slips and pass books;

(e) even to print or write those forbidden words in any of its accounting records (see Defendant's Ex.

PP, which requires national banks to use the word "savings" in those reports to the Comptroller of the Currency);

(2) in any form of its advertising or its publicity, which of course, includes oral as well as written, as long as the utterance relates to its banking or financial business.

Other similar inferential injunctions imposed by the law a question could be cited. Those enumerated surely hamper defendant in the exercise of the power bestowed upon it by Congress as it exerts "such incidental powers as shall be necessary to carry on the business of banking" (U. S. Code, tit. 12, § 24). Receiving "savings deposits" is a part (the uncontradicted evidence indicates that it is a very important part) of defendant's banking business. The evidence also reveals that defendant could not function without "savings deposits" (728, 729). Therefore, receiving such deposits becomes a necessary element in enabling defendant to prosecute its banking business and to render the service to the United States Government in maintaining its system of banking and to the public which Congress intended it should. If receiving "savings deposits" is a necessary part of defendant's banking business, crippling obstruction placed in defendant's way amounts to *impairment* of defendant's banking business. Likewise, the prohibitions mentioned above, viz: no signs, no printing, no advertising and no publicity, with the words "saving" or "savings" therein, *embarrasses* defendant and certainly *restricts* it "tremendously" (236) in obtaining "savings deposits." (*First Nat. Bank v. Fellows*, 244 U. S. 416; *Fidelity Nat. Bank & Trust Co. v. Enright*, 264 F. 236, 239, Paton's Digest (1940), p. 645).

To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make "savings deposits" with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress.

Under such conditions one law or the other must give way. The State law must yield to the Federal law—the supreme law of the land (U. S. Const., art. VI).

Commencing with *McCulloch v. Maryland* (4 Wheat. [U. S.] 316), the Supreme Court, as well as other courts, has consistently held that a State statute may not defeat in whole or in part the objectives expressed or implied in an act of Congress which is constitutional. The facts in some of those cases are: In the above case, the State vainly sought to impose a tax upon a branch bank of the Bank of the United States. In *Missouri ex rel. Burnes Nat. Bank v. Duncan* (265 U. S. 17) the State offense was legislation which forbade the appointment of national banks to serve as testamentary executors, while State trust companies competing with national banks, were authorized to serve as such executors. In *First Nat. Bank v. California* (262 U. S. 366), the invalidated State law provided for the escheat to the State of dormant deposits in a solvent national bank.

A quotation from *Easton v. Iowa* (188 U. S. 220) typifies the attitude of the Supreme Court and provides a most obvious reason for its viewpoint. The court said: "That legislation [The National Bank Act] has in view the erection of a system extending throughout the country, and independent, as far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." (P. 229). That decision also held that Congress "having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations". (P. 238).

To continue with examples of State laws invalidated for interference with Federal instrumentalities, in *Fidelity Nat. Bank & Trust Co. v. Enright* (264 F. 236, supra [U. S. Dist. Ct., W. D. Mo., 1920]), the voided State law forbade a national bank to use the words "trust" or "trust company" in its advertising, where the fact was that the word "trust" was part of the national bank's name; the name

having been approved by the Comptroller of the Currency according to the National Banking Act.

I consider that I have cited a sufficient number of varying, as to the nature of the interferences, cases to demonstrate the state of the law with regard to particular situations, some of which, in their facts, approximate the facts in this case (*Fidelity Nat. Bank & Trust Co. v. Enright, supra*, for instance).

There is no doubt that creatures of the Congress are subject to States' police powers enacted into law (*Engel v. O'Malley*, 219 U. S. 128, aff. 182 F. 365), but the law which accordingly subjects them should be an exercise of a real police power. Plaintiff cites no case in line with the situation at bar which supports his contention that subdivision 1 of section 258 is police power legislation. The facts and law deny that contention in this situation because deposits (up to \$10,000) in national banks are insured Federally the same as savings banks' deposits are insured (up to \$10,000). I must hold that subdivision 1 of section 258 is not that type of law.

Plaintiff concedes that section 371 of the Federal Reserve Act upon which defendant relies, authorizes national banks, without equivocation, to receive "savings deposits". Plaintiff argues, however, that neither that act of Congress nor any other authorizes a national bank to advertise the fact. The answer to that contention is that such a power may be implied, especially since Congress has provided for national banks "such incidental powers as shall be necessary to carry on the business of banking" (U. S. Code, tit. 12, § 24).

One would be wholly unobserving who did not recognize that there is competition among the banks in the banking world; that the daily press abounds with advertising by banks; that often the rate of interest paid on savings accounts is stressed. A witness in this case testified as to that stressing (209).

It cannot be denied—and it is not—that national banks may advertise for deposits, including savings deposits. The Attorney-General argues that in such national bank advertising, the terms "time accounts" should be used or

"thrift accounts" or one or more of the other substitutes to give public notice that national banks may receive "savings deposits". He would have them use any term except "savings deposits"—the very words found in the act of Congress. Is there any reason why national banks in their publicity should use the term "time deposit" and not "savings deposits"? Those two terms are side by side in section 371 of title 12 of the United States Code.

The Attorney-General further contends that when Congress amended the Federal Reserve Act by specifying "savings deposits" as a kind of deposit which a national bank may receive, that action was without effect and without meaning, because at the time and for long prior, national banks were receiving what actually were savings deposits by virtue of their authority to receive "time deposits" (U. S. Code, tit. 12, § 317). I cannot subscribe to that reasoning. On the contrary, because of the peculiar wording of the empowering provision: National banks may "continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same", I consider that Congress meant to accomplish two results: first, that national banks in the conduct of their business should have the benefit of people's savings deposits and second, that all doubt about the right of national banks to receive such deposits should be dispelled. There had been some controversy concerning the right of a national bank to advertise and use the word "savings" which had been resolved in favor of the national banks by the administrative branch of the United States Government (1 Federal Reserve Bulletin [1915], p. 18). The choice of language by Congress was intended to legislatively put that dispute at rest. If the intendment of Congress was as I have indicated, a State law restricting the publicizing of the power thus granted would tend, may I repeat, to defeat the obvious objective of the law.

National banks may and do advertise (U. S. Code, tit. 12, §§ 583-586). There are authorities directly in point. Paton's Digest (1940) holds that the right of a national bank to receive savings accounts necessarily includes the incidental right to advertise as a national bank for such

accounts (p. 645). This author also expressed the same view in the 1926 edition of his digest at page 1226 (Vol. 2, §§ 637a, 638a). To the same effect is Fletcher's *Cyclopedia Corporations* ([Perm. Ed.], Vol. 6, § 2508, p. 305). There are Federal departmental opinions holding similarly (1 Federal Reserve Bulletin [1915], p. 18). No judicial determination on the precise question has been cited in the briefs or in the text books.

I am satisfied that national banks, as they use the words "saving" and "savings" in advertising and publicizing that they may receive "savings deposits" are exercising an implied and incidental power conferred upon them by Acts of Congress (U. S. Code, tit. 12, §§ 24, 371).

The restrictive nature of subdivision 1 of section 258 of the New York Banking Law, defeats the purposes for which Congress created defendant (U. S. Code, tit. 12, § 371). That defeat could be entire were defendant obligated to suspend for lack of enough savings deposits (728-9, 737). with which to operate its business. The New York statute is unconstitutional.

Plaintiff's motions to strike out testimony and for judgment upon which I reserved decision are denied. Defendant's motion to dismiss the complaint at the end of the plaintiff's case upon which I reserved decision is denied. Defendant's motion made at the end of the whole case for judgment dismissing the complaint is granted, with costs.

Judgment with costs in defendant's favor dismissing the complaint will be entered.

APPENDIX B**MEMORANDUM OPINION OF THE SUPREME COURT
OF NEW YORK, APPELLATE DIVISION, SECOND
DEPARTMENT**

THE PEOPLE OF THE STATE OF NEW YORK, *Appellant*

v.

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, *Respondent*

Memorandum opinion by the Appellate Division, Second
Department, January, 1953

Action by the People of the State of New York against a national bank for a permanent injunction, restraining defendant from violating subdivision 1 of Section 258 of the Banking Law. Plaintiff appeals from a judgment dismissing the complaint on the merits after trial. Judgment reversed on the law and the facts, with costs, and judgment directed for the plaintiff, with costs, restraining defendant, its officers, agents, servants and employees from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank. Findings of fact inconsistent herewith are reversed and new findings are made as indicated herein. Respondent admitted deliberate violation of the statute, and failed to establish its defense of unconstitutionality. Savings banks have developed in this State as a distinctive type of mutual institution, since their beginning, with special benefits and safeguards. (*Mercantile Bank v. New York*, 121 U. S. 138). For almost a century only such banks have been allowed by State law to put forth a sign as a savings bank. (L. 1858, ch. 132.) For almost half a century the only banks permitted to use the word "savings" in the State of New York have been the mutual savings banks. (L. 1905, ch. 564.) Thus there was basis for a legislative finding that in the course of time the word "saving" or "savings" had become so associated with the idea of "savings bank" that, if used by another kind of bank, some people were apt

be misled into thinking it to be a mutual savings bank. *Erring, etc., Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 9 L. R. A. 148, *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; 150 A. L. R. 1095, 1134-1135, and cases cited in annotation.) In addition, there is a presumption that there was sufficient basis for the Legislature to act (Am. Jur., Constitutional Law, § 132), which respondent failed to meet and overcome by competent proof. The police power of the State is not limited to the preservation of public health and safety, but extends to the prevention of fraud, deceit and imposition. (*Merchants Exchange v. Missouri*, 248 U. S. 365; *Hall v. Geiger-Jones Co.*, 242 U. S. 9.) Such power may be exercised to protect not only the intelligent and prudent, but also the ignorant and weak, from being imposed upon. (*Dillingham v. McLaughlin*, 244 U. S. 370, 374; *Dent v. West Virginia*, 129 U. S. 114, 32; *People ex rel. Bennett v. Leman*, 277 N. Y. 368, 375.) Section 258 of the Banking Law is an exercise of the police power aimed at preventing a deception from being practiced upon the public. (*People v. Binghamton Trust Co.*, 39 N. Y. 185, 192.) As such, its prohibition of the use of the words in question does not constitute an unreasonable deprivation of rights. (*Dillingham v. McLaughlin*, *supra*.) In such a case it is not necessary that there be intent to deceive; the State may seek to prevent innocent, as well as intentional, deception. (*Fed. Trade Comm. v. Algoma Co.*, 291 U. S. 67; *Quaker Oats Co. v. City of New York*, 295 N. Y. 527; *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d, 33, 36.) Nor did the establishment of the Federal Deposit Insurance Corporation vitiate the statute in question, for it did not eliminate the need upon which the law was based. Since the assets of this corporation, and the coverage it provides, are limited, its protection against loss is limited. Furthermore, it in no way prevents the public from being misled, to which protection it is entitled (*Fed. Trade Comm. v. Algoma Co.*, *supra*), and for which purpose the statute was enacted (*People v. Binghamton Trust Co.*, *supra*). The State statute herein is not in conflict with Federal law. National banks possess only the powers conferred by the Con-

gress. (*Colorado Bank v. Bedford*, 310 U. S. 41, 48.) It is conceded that the provision of the Federal Reserve Act, relied upon by respondent (U. S. Code, tit. 12, § 371), does not expressly confer upon such banks the right to use the words "saving" or "savings" in their dealings with the public; and since both the State and Federal statutes can consistently stand together, it may not be implied that when Congress authorized national banks to "continue * * * to receive * * * savings deposits", it intended thereby to supersede the State statute prohibiting them from advertising in a manner found to be misleading by the State Legislature. (*First Nat. Bank v. Missouri*, 263 U. S. 640; *Napier v. Atlantic Coast Line*, 272 U. S. 605, 611; *Maurer v. Hamilton*, 309 U. S. 598, 614; *Reid v. Colorado*, 187 U. S. 137, 148; *Savage v. Jones*, 225 U. S. 501, 533-534.) Neither does the challenged statute unduly interfere with the operation of a Federal instrumentality. While there is testimony that the prohibition contained therein imposes an advertising handicap on them in their efforts to increase their interest-bearing accounts, the undisputed evidence that such accounts have grown substantially, and that National banks have enjoyed continued prosperity notwithstanding said statute, refutes the claim that it is a "crippling obstruction." National banks, being *privately owned* stock corporations in which the Government has an interest, are not entitled to the privileges of Government departments (*Emer. Fleet Corp. v. West. Union*, 275 U. S. 415, 425-426) and are not entitled to the immunities of the United States, or any State or political subdivision thereof. (*National Labor Relations Board v. Bank of America*, 130 F. 2d 624, 626-627, certiorari denied 318 U. S. 791.) State regulations under the police power are not invalid, even when they impose some burdens on the *National Government* of the same kind as those imposed on citizens within the State's borders. (*Oklahoma Tax Comm. v. Texas Co.*, 336 U. S. 342, 352; *Penn Dairies v. Milk Control Comm.*, 318 U. S. 261, 270-271.) It follows that such a regulation is not improper solely because it places some burden on *national banks*. (*First Nat. Bank v. Missouri*, 263 U. S. 640, *supra*; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, *supra*.)

is the State statute herein discriminatory, for by its terms it applies equally to all commercial banks, State chartered as well as Nationally chartered. For purposes of regulation, banks may be divided into different classes (2 Am. Jur. Constitutional Law, § 506, pp. 187-188); and savings banks, which do not operate under the same conditions as commercial banks, form a reasonable classification where, as here, such differentiation is required for a valid statutory purpose (*Provident Savings Institution v. Malone*, 221 U. S. 660, 666; *Mercantile Bank v. New York*, 21 U. S. 138, 161, *supra*). Since the prohibition applies equally to all institutions in similar circumstances and operating under the same conditions, it is not such class legislation as is prohibited by constitutional provisions. (2 Am. Jur., Constitutional Law, §§ 504, 505, and cases cited; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Hotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.) Finally, the statute does not forbid the use of the expressions heretofore permitted by the State Banking Department (2 Sutherland on Statutory Construction [3d ed.], § 5107, and cases cited); or in terms prohibit the voluntary publicizing of U. S. Savings Bonds in furtherance of Government business (*Davis v. Elmira Savings Bank*, 161 U. S. 275); nor do reports to Government departments come within its purview. Carswell, Wenzel and Schmidt, JJ., concur;

Nolan, P. J., dissents and votes to affirm, with the following memorandum: Section 258 of the Banking Law is in conflict with the Federal statute (Federal Reserve Act, § 24; U. S. Code, tit. 12, § 371), insofar as it forbids the use of the word "savings". I agree that the State has the power to protect the public, by preventing national banks from purporting to act as savings banks and even from using the word "savings" in a manner which might deceive depositors in that respect. The purpose should be accomplished by regulation, however, and not by a prohibition which would prevent even a verbatim statement by a national bank of the Federal law, which specifically permits national banks to receive *savings deposits*. Adel, J., not voting. [200 Misc. 557.].

APPENDIX C

OPINION OF THE COURT OF APPEALS OF NEW
YORK, JULY 14TH, 1953THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,*v.*FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE, *Appellant*
DESMOND, J.:

Defendant is a national bank, organized under the National Bank Act (U. S. Code, tit. 12, § 21 et seq.). Pursuant to authorization by the Comptroller of the Currency, it transacts banking business in the village of Franklin Square, Nassau County, New York. In this suit, brought by the State because of alleged violations by defendant of subdivision 1 of Section 258 of the New York Banking Law, defendant has been restrained and enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank". Section 258 (subd. 1, *supra*) is in full as follows:

"§ 258. *Prohibition of unauthorized savings banks and use of the word 'savings'; exceptions as to school savings.*

"1. No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company,

national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

It is undisputed that defendant has, since 1947, used the words "saving" and "savings" in many different ways, in the advertising and conduct of its banking operations. It has, by advertising and otherwise, solicited "savings accounts", has put up over some of its tellers' windows, signs containing the word "savings", has a special department for "Children's Savings", refers in its literature and printed forms to its "savings department" and, in general, it routinely and extensively uses the words "saving" and "savings" to bring to itself "savings deposits" in competition with savings banks and savings and loan associations in Nassau County and elsewhere. Thus it is clear, without further elaboration of the facts, that this national bank has in fact violated so much of Section 258 (subd. 1, *supra*) as prohibits the use of the two words "saving" and "savings". However, we find in the record no evidence at all that defendant has violated, or threatens or intends to violate, the other prohibition of the above-quoted statute, which runs against "soliciting or receiving deposits as a savings bank". Therefore, so much of the injunction as prohibits "soliciting or receiving deposits as a savings bank" is unwarranted and must be stricken regardless of anything else in the case (1 High on Injunctions [4th ed.] § 22: *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, 265, 28 Am. Jur., Injunctions, § 29).

That brings us to our real question: is the State statute above quoted unconstitutional as contravening a controlling and over-riding Federal statute on the same subject, and as interfering with the operations of a national bank?

First, as to whether there is a contrary Federal statute: the enactments which, according to appellant, authorize it, as a national bank, to use and advertise the word "saving" or "savings" are in the Federal Reserve Act, and are Sections 371 and 583-586 of title 12 of the United States Code. The statutory language on which appellant relies is in Sec-

tion 371 (U. S. Code, tit. 12), as follows: "Any such [national banking] association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed", and in Sections 583-586 (U. S. Code, tit. 12 [now in U. S. Code, tit. 18, § 709]), which (in a negative sort of way) authorize national banks to advertise, and which contain no prohibition against the use, in such advertising, of the word "saving" or the word "savings" (see, also, U. S. Code, tit. 12, § 24, as to "incidental powers" of national banks, and *Hernandez v. First Nat. Bank*, 125 Neb. 199, 205). Defendant-appellant says that the matter is as simple as this: Congress has (expressly) licensed these national banks to receive "savings deposits" and pay interest on "savings", and has (inferentially) licensed them to advertise to the public the provision of such banking services. So, says appellant, we have a direct conflict between the authorizations of the Federal statutes and the prohibitions of the State Banking Law.

There is no dispute as to the respective roles which the United States Government and the several States play, generally, in regulating national banks. Under Section 8 of Article I of the Federal Constitution, Congress has power to, and does, incorporate national banks and has the paramount power of regulating them; any applicable Federal laws are supreme in the field; national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not interfere with the functioning of the banks, and which do not contravene Federal laws (*First Nat. Bank v. California*, 262 U. S. 366, 368; *Burnes Nat. Bank v. Duncan*, 265 U. S. 17; *Lewis v. Fidelity Co.*, 292 U. S. 559, 566; *Seabury v. Green*, 294 U. S. 165, 169; *Jennings v. U. S. F. & G. Co.*, 294 U. S. 216; *Anderson Nat. Bank v. Lockett*, 321 U. S. 233; *Roth v. Delano*, 338 U. S. 226, 230; *Standard Oil*

Co. v. New Jersey, 341 U. S. 428, 441; *Lauer v. Bayside Nat. Bank*, 244 App. Div. 601; *Matter of Baldwinsville Fed. Sav. & Loan Assn.* [Van Wie], 268 App. Div. 414, 422, 423; *Clark v. First Nat. Bank of Morrisville*, 130 Misc. 352, 354; *United States Pipe & Foundry Co. v. City of Hornell*, 146 Misc. 812, 815; *Matter of Keene*, 152 Misc. 424, 425; 7 Michie on Banks and Banking, ch. 15, §§ 3, 4, 5). Clearly, "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law" (*Lewis v. Fidelity Co.*, *supra*, 292 U. S., at p. 566).

Since our State statute clearly and unambiguously forbids the very thing defendant is admittedly doing, our problem comes down to this: do the Federal statutes above cited contain, or amount to, an express authorization to national banks for such activity, that is, for using the State-prohibited words "saving" and "savings", or is the Federal statutory reference to "savings deposits" merely descriptive of a well-known type or kind of bank deposits, rather than a statutory license to use certain specified words, which in turn are forbidden in this State? We conclude, for reasons hereafter stated, that there is no direct conflict, between the Federal and State statutes, as to what national banks may and may not do by way of advertising for, and taking, "savings deposits". The State of New York does not prevent defendant from carrying on a particular kind of banking business, but does forbid a misleading description of that business.

State laws promoting fairness in business transactions should, of course, apply to national banks (*Schramm v. Bank of Cal.*, 143 Ore. 546, 578; *Steadman v. Redfield*, 67 Tenn. 337, 338-339; and see remarks of Justice Holmes, re competition in *Abilene Nat. Bank v. Dolley*, 228 U. S. 1, 4). Our State law expresses an old, wise policy of protecting our citizens against being fooled (see *People v. Binghamton Trust Co.*, 65 Hun 384, *affd.* 139 N. Y. 185, as to the legislative purpose). So read, our State statute is valid and enforceable despite a superficial, or seeming, contradiction between the phrasing of the two enactments. In other words, while the Federal statute prescribes the kind of business that national banks may carry on, the State statute, to avoid

deception of our people, interdicts the use, in the Federally-prescribed business, of certain nonessential words, and there is no Federal statute relating to the use of those words, as such. Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage. The Attorney-General of New York, in his brief, makes it clear that this State does not claim for savings banks a monopoly on receipt of deposits of the "savings" type, but he insists that the State of New York is acting within its powers in seeing to it that members of the public are not misled into believing that commercial banks, like defendant, are mutual savings banks. He admits that the national banks are empowered to handle "savings" type deposits, and to advertise, but he argues that the State is not hampering either of those activities.

It is unnecessary here to describe in detail the differences between commercial and savings banks (see New York State Banking Law, arts. III, V, VI; 8 Michie on Banks and Banking, ch. 16, § 1; *Matter of Wilkins*, 131 Misc. 188, 193; *State v. People's Nat. Bank*, 75 N. H. 27; *Bank of Redemption v. Boston*, 125 U. S. 60, and see the learned opinion of the Special Term Justice in the present case, 200 Misc. 557, 566 *et seq.*). The difference, shortly stated, is this: commercial banks, State and national, are profit-making business corporations owned by stockholders, while, in New York at least, savings banks are mutual institutions, having no stockholders but earning money for the depositors, the fundamental purpose of their existence being protection of small deposits, and their principal method of accomplishing that purpose being caution and conservatism in investments (see 1 Morse on Banks and Banking [6th ed.], § 3).

On the question of whether this New York statute unduly impedes national banks in carrying out their lawful purposes, it is significant, although not conclusive, that this record shows that none of the national banks operating in New York State, except defendant, have used the word "saving" or "savings", and that all of them (except defendant) have found it possible (although seriously incon-

venient, say defendant's witnesses) to carry on the business of receiving this type of deposit, by the use, in their advertising and other literature and business forms, of such synonymous expressions as "special interest account", "thrift account" and "compound interest account".

The New York Legislature's design and effect to prevent deception as to savings banks has a long history. The first enactment was in chapter 132 of the Laws of 1858, which, among other things, made it unlawful for a certain kind of commercial bank to "put forth a sign as a savings bank" (see, also, L. 1875, ch. 371: *People v. Doty*, 80 N. Y. 225). The prohibition against describing a commercial bank as a savings bank was added to and strengthened by a 1905 enactment (ch. 564), which forbade the use of the word "savings", by any but savings banks or building and loan associations. Thus, the general legislative purpose has been asserted for nearly a century and the statute in its present form is nearly a half century old. The validity of this purpose and the general validity of these statutes has, over and over again, been asserted by the State Attorney-General (see 1898 Atty. Gen. 265-267; 1902 Atty. Gen. 314-315; 1907 Atty. Gen. 473-475; 1908 Atty. Gen. 382-383). The 1907 opinion contained a specific holding that national banks had no right to hold themselves out as savings banks, or to advertise as such (however, there was then no specific reference in the Federal laws to "savings accounts"). All of this adds up to this result: that the New York policy and method is an old and reasonable one, that it does not seem, when complied with by other national banks in this State, to have had seriously harmful effects on them, and that, accordingly, the legitimate national banking activity, of taking and advertising for interest accounts, is not substantially interfered with by the State's prohibition of the use of misleading words. Insofar as the record presents a question of fact as to the substantiality of that interference, the weight of evidence confirms the finding of the Appellate Division that the number of accounts of the "savings type" has increased greatly in those national banks in the State which have obeyed subdivision 1 of section 258, and that those national banks "have enjoyed con-

tinued prosperity notwithstanding said statute" (281 App. Div. 757, 758).

We see no benefit to appellant's position in the fact that since 1905, our statute has permitted a "savings and loan association" as well as a "savings bank" to use the words "saving" and "savings". The character and purposes of savings and loan associations are, under New York law (see Banking Law, art. X), so similar to those of savings banks as to call for the same kind of protection.

The judgment of the Appellate Division should be modified by striking from the second ordering paragraph thereof the words "and from in any way soliciting or receiving deposits as a savings bank" and, as so modified, affirmed.

Fuld, J. (dissenting). While federal legislation explicitly authorizes national banks to receive "savings deposits" and to pay interest on "savings" (Federal Reserve Act, U. S. Code, tit. 12 § 371) and vests them with "such incidental powers as shall be necessary" (National Bank Act, U. S. Code, tit. 12 § 24, subd. 7: see *Clement Nat. Bank v. Vermont*, 231 U. S. 120, 140), this state's Banking Law, in contrast, unequivocally prohibits a "national bank" from making "use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use [of] any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business" (Banking Law, § 258, subd. 1).

Mere reading of these two provisions reveals a conflict, patent and irreconcilable. New York's Banking Law provision severely limits the power of national banks to do exactly what the federal statute authorizes. (See, e.g., 2 Paton's Digest of Legal Opinions [1926 ed.], p. 1226; 1 Paton's Digest of Legal Opinions [1940 ed.], p. 645.) The right to accept "savings deposits" and maintain "savings accounts" can mean very little if the bank, by virtue of state statute, must hide that fact or announce it in terms that fail to make it clear. Indeed, to tell a bank that it can receive "savings deposits" and yet must not publicize the fact is very much like telling a property owner that he may produce vegetables, but must not water or cultivate them.

In a very real sense, the state statute hampers the conduct of banking activities deemed by the federal government to be necessary and beneficial. As the court at Special Term succinctly declared, "To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make 'savings deposits' with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress. Under such conditions, one law or the other must give way. The State law must yield to the Federal law—the supreme law of the land (U. S. Const., art. VI)." (200 Misc. 557, 571.)

The state acknowledges, as, of course, it must, that national banks are empowered, as an incident of their business, to receive "savings deposits" and maintain "savings accounts." Since those activities are concededly legitimate and in the public interest, there is no basis for the claim that advertising them *in the precise language of the Federal Reserve Act* can be deceptive or harmful. If a national bank conducts only the type of business which the Federal Reserve Act sanctions and if it informs the public of the nature of that business by using only the exact language of the federal enactment, how may it be said—as it is (opinion of Desmond, J., p. 460)—that the state law serves the vital function "of protecting our citizens against being fooled"? *

Section 258 of the Banking Law, insofar as it prohibits national banks from quoting the very words of the Federal Reserve Act, authorizing them to receive and pay interest on "savings deposits", clashes with the paramount federal law and, accordingly, must be stricken as unconstitutional. (Cf., e.g., *Easton v. Iowa*, 188 U. S. 220, 229-230, 238; *First Nat. Bank v. California*, 262 U. S. 366, 368 *et seq.*; *Fidelity Nat. Bank & Trust Co. v. Enright*, 264 F. 236; *Spring-*

* Virtually eliminated, it should be noted, is any risk of loss to those who maintain a "savings, time, or thrift account" in a national bank: such deposits, up to \$10,000 by any depositor, are insured by the Federal Deposit Insurance Corporation (Federal Deposit Insurance Act, U.S. Code, tit. 12, § 1813, subd. 1; § 1821).

field Inst. for Sav. v. Worcester Fed. Sav. & Loan Assn., 329 Mass. —, 107 N. E. 2d 315, certiorari denied 344 U. S. 884.)

The judgment of the Appellate Division should be reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

Lewis, Ch. J., Conway, Dye and Van Voorhis, JJ., concur with Desmond, J.; Fuld, J., dissents in opinion in which Froesel, J., concurs.

Judgment accordingly.

APPENDIX D

APPLICABLE PROVISIONS OF CERTAIN NEW YORK STATUTES AND OF THE FEDERAL RESERVE ACT

Section 258(1) of the New York Banking Law provides:

“1. No bank, trust, company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word ‘saving’ or ‘savings’ or their equivalent in its banking or financial business, or use any advertisement containing the word ‘saving’ or ‘savings,’ or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word ‘savings’ in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued.”

The pertinent provisions of Sections 24 and 19 of the Federal Reserve Act (12 U. S. C. 371, 461) provide:

“§ 371. Loans on farm lands and improved real estate; time and savings deposits; loans for construction of residential or farm buildings.

“Any national banking association may make real-estate loans secured by first liens upon improved real estate, including improved farm land and improved business and residential properties. A loan secured by real estate within the meaning of this section shall be in the form of an obligation or obligations secured by a mortgage, trust deed, or other instrument upon real estate, which shall constitute a first lien on real estate in fee simple or, under such rules and regulations as may be prescribed by the Comptroller of the Currency, on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the loan is made or acquired by the national banking association, and any national banking association may purchase any obligation so secured when the entire amount of such obligation is sold to the association. The amount of any such loan hereafter made shall not exceed 50 per centum of the appraised value of the real estate offered as security and no such loan shall be made for a longer term than five years; except that (1) any such loan may be made in an amount not to exceed 60 per centum of the appraised value of the real estate offered as security and for a term not longer than ten years if the loan is secured by an amortized mortgage, deed of trust, or other such instrument under the terms of which the installment payments are sufficient to amortize 40 per centum or more of the principal of the loan within a period of not more than ten years, and (2) the foregoing limitations and restrictions shall not prevent the renewal or extension of loans heretofore made and shall not apply to real-estate loans which are insured under the provisions of Sections 1707-1715d, 1736-1746, 1748-1748g, Section 1706c of this title or subchapter X of chapter 13 of this title or which are insured by the Secretary of Agriculture pursuant to Sections 1001-1005d of Title 7. No such as-

sociation shall make such loans in an aggregate sum in excess of the amount of the capital stock of such association paid in and unimpaired plus the amount of its unimpaired surplus fund, or in excess of 60 per centum of the amount of its time and savings deposits, whichever is the greater. Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located."

"§ 461. Demand and time deposits defined.

"The Board of Governors of the Federal Reserve System is authorized, for the purposes of this section and Sections 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title, to define the terms 'demand deposits', 'gross demand deposits', 'deposits payable on demand', 'time deposits', 'savings deposits', and 'trust funds', to determine what shall be deemed to be a payment of interest, and to prescribe such rules and regulations as it may deem necessary to effectuate the purposes of this section and Sections 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title and prevent evasions thereof: *Provided*, That, within the meaning of the provisions of this section and Sections 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title regarding the reserves required of member banks, the term 'time deposits' shall include 'savings deposits'. Dec. 23, 1913, c. 6, § 19, 38 Stat. 270; June 21, 1917, c. 32, § 10, 40 Stat. 239; Aug. 23, 1935, c. 614, § 324(a), 49 Stat. 714."

APPENDIX E**APPLICABLE PROVISIONS OF CERTAIN
CALIFORNIA AND MINNESOTA STATUTES**

Section 3394 of the California Banking Code provides:

"§ 3394. *Savings bank business by bank which has not received certificate of authority.* No bank which has not received a certificate authorizing it to engage in the savings bank business shall advertise or put forth a sign as a savings bank, or directly or indirectly solicit or receive deposits or transact business in the way or manner of a savings bank, or advertise that it is receiving or accepting savings, or do anything which might lead the public to believe that deposits are received or invested under the same conditions or in the same manner as deposits in savings banks."

Title 47.23 of the Minnesota Statute provides, in part:

"47.23 Savings Departments"

"Subdivision 1. Except as specifically authorized by other laws of this state, no individual, partnership, unincorporated association, or corporation, other than a savings bank, safe deposit company, or trust company, holding an effective certificate of authority or license issued by the commissioner of banks and subject to and complying with all of the provisions of law relating to such savings banks, safe deposit companies, and trust companies, respectively, shall in any manner display or make use of any sign, symbol, token, letterhead, card, circular, or advertisement stating, representing or indicating that he, it, or they, are authorized to transact the business which a savings bank, safe deposit company, or trust company usually does, or under these provisions is authorized to do; nor shall any such individual, partnership, unincorporated association, or corporation use the words 'savings' or 'trust' or 'safe deposit' alone or in combination in title or name or otherwise, or in any manner solicit business or make loans or solicit or receive deposits or transact business as a savings bank, safe deposit company, or trust company; except

that a state bank, or trust company, regularly incorporated and authorized to do business under the laws of this state, may establish and maintain a savings department under the supervision of the commissioner of banks, and may solicit and receive deposits in this savings department and advertise the same as such, and every such trust company having a savings department may use in its name or title, in addition to the word 'trust,' the word 'savings' or 'savings bank.' Savings deposits received by any trust company using the word 'savings' or 'savings bank' in its name or title shall be invested only in authorized securities, as defined by law, and the trust company shall keep on hand, at all times, such securities as deposits in savings bank may be invested in to an amount at least equal to the amount of the deposits, and these securities shall be the representative of, and the fund for, applicable first and exclusively to the payments of, the savings deposits. Deposits received by the trust company subject to its right to require notice of withdrawal evidenced by passbooks shall be deemed savings deposits."

APPENDIX F

DEFENDANT'S EXHIBIT No. OO

A CERTIFIED COPY OF A LETTER DATED JULY 10, 1939, FROM THE DEPUTY COMPTROLLER OF THE CURRENCY TO THE ATTORNEY GENERAL OF NEW YORK

Certificate for Certified Copy

TREASURY DEPARTMENT,

Office of Comptroller of the Currency, ss:

I, J. L. Robertson, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete copy of a letter sent by the Comptroller of the Currency. to Honorable John J. Bennett, Jr., At-

ney General for the State of New York, Albany, New York, on July 10, 1939.
 n Testimony Whereof, I have hereunto subscribed my
 ne and caused my seal of office to be affixed to these pres-
 s at the Treasury Department, in the City of Washing-
 n and District of Columbia, this 20th day of November,
 D. 1950.

J. L. ROBERTSON,

Acting Comptroller of the Currency.

[Seal.]

Copy

July 10, 1939.

onorable John J. Bennett, Jr.,
 ttorney General for the State of New York,
 lbany, New York.

EAR SIR:

There has been brought to our attention opinions of the
 ttorneys General of the State of New York, relating to
 the use of the words "saving" or "savings" by national
 banks in your state in advertising they may receive savings
 accounts and to the use of the term "Savings Department"
 to designate the department in which savings deposits are
 received. These opinions are dated respectively, July 2,
 1907, reported in 1907 Opinions Attorney General 473,
 February 6, 1908, reported in 1908 Opinions Attorney Gen-
 eral 382, December 18, 1916, reported at 10 State Depart-
 ment Reports 489, and May 25, 1927 addressed to Honor-
 able Milan E. Goodrich, Gilbert Park, Ossining, New York
 and not reported.

In this connection our attention also has been called to
 section 258 of the Banking Law of the State of New York,
 formerly section 279, which reads as follows:

"1. No bank, trust company, national bank, individ-
 ual, partnership, unincorporated association or corpo-
 ration other than a savings bank or a savings and loan
 association shall make use of the word 'saving' or
 'savings' or their equivalent in its banking business,
 or use any advertisement containing the word 'saving'

or 'savings', or their equivalent, * * *. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

Inasmuch as it is believed by this office that the above noted opinions of the Attorney General are in error, and inasmuch as it is believed that the statute quoted has no applicability to national banks, the Office of the Comptroller of the Currency would appreciate your reconsideration of such opinions in the light of the following.

It has been clearly established by the courts that, in relation to the organization, powers and operation of national banks, Federal law is controlling if there is a conflict between the Federal law and the law of the State where the bank is situated. The cases relative thereto hold in effect that national banks, being instrumentalities of the Federal Government, are necessarily subject to the paramount authority of the United States and any attempt by the state to define their duties, or to control the conduct of their affairs, is absolutely void where such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for which they were created. *Old Company's Lehigh v. Meeker* (1935), 294 U. S. 227; 79 L. Ed. 876, 55 S. Ct. 392; *Davis v. Elmira Savings Bank* (1896), 161 U. S. 275; 40 L. Ed. 700; *Easton v. Iowa* (1903), 188 U. S. 220, 47 L. Ed. 452; *Farmers' & Mechanics' National Bank v. Dearing* (1875), 91 U. S. 29, 23 L. Ed. 196; *Brownell v. Turman* (1935), 75 F. (2) 913; *Spradlin v. Royal Manufacturing Company* (1934), 73 F. (2) 776. Cf. *Fidelity National Bank and Trust Company v. Enright* (1920), 264 Fed. 236, in which an unsuccessful endeavor was made to prevent a national bank from using the words "Trust Company" in its title, the Court saying *inter alia*: "When the Government of the United States enters any field over which Con-

ress is given expressed, or necessarily implied, jurisdiction, it appropriates that field to the fullest extent necessary to insure the complete and effective exercise of its sovereignty. The name of a national bank must be approved by the Comptroller of the Currency. It can be changed, or its use interfered with, by no other authority. We have here, then, a national bank empowered by the laws of the United States to act in a fiduciary capacity and bearing a name confirmed by national authority. *Clearly any act on the part of the state which impairs, hampers, embarrasses, restricts, or, in effect, wholly prevents, the discharge of its functions as a national banking institution with the incidental powers enumerated must be void, because in express conflict with the paramount laws of the United States.*" (Italics supplied.)

Also, the Supreme Court of the United States has often pointed out the necessity for protecting Federal agencies against interference by state legislation. *M'Culloch v. Maryland* (1819), 4 Wheat. 316, 4 L. Ed. 579; *Osborne v. United States Bank* (1824), 9 Wheat. 738, 6 L. Ed. 204; *Farmers' and Mechanics' National Bank v. Dearing, supra*; *California v. Central Pacific Railroad Company* (1887), 127 U. S. 1, 32 L. Ed. 150; *Davis v. Elmira Savings Bank, supra*; *Easton v. Iowa, supra*; *Covington v. First National Bank* (1904), 198 U. S. 100, 49 L. Ed. 963; *Farmers & Mechanics Savings Bank v. Minnesota* (1913), 232 U. S. 516, 58 L. Ed. 706; *Choctaw, Oklahoma and Gulf Railroad Company v. Harrison* (1914), 235 U. S. 292, 59 L. Ed. 234; *Bank of California v. Richardson* (1918), 248 U. S. 276, 63 L. Ed. 372; *First National Bank v. California* (1922), 262 U. S. 366, 67 L. Ed. 1030. The Court in *First National v. California, supra*, in discussing the question whether a state could confiscate the dormant deposits of a national bank under a state law stated at page 370 that: "The success of almost all commercial banks depends upon their ability to obtain loans from depositors, * * *" i.e., that the success of all commercial banks depends upon their ability to obtain deposits. The Court indicated that the state could not, by the confiscation of dormant deposits, impair the bank's ability to obtain deposits.

Thus, all powers that are expressly granted by Congress, through Federal legislation are paramount over any laws of a state which attempt to control or to impair the efficiency of such banks in exercising powers so expressly granted.

National banks, at the present time, are, by the express terms of Federal law, granted the power to "continue hereafter as heretofore to receive time and savings deposits."

As an actual fact, national banks have been permitted, under interpretation of the Office of the Comptroller of the Currency and the Federal Reserve Board, to receive savings accounts and establish savings departments for a period of more than 20 years.

In amending section 24 of the Federal Reserve Act, (Act of December 23, 1913, 38 Stat. 251) Congress by Act of Sept. 7, 1917 39 Stat. 752, expressly provided that national banks "may continue hereafter as heretofore to receive time deposits and to pay interest on the same".

This provision in the 1917 amendment was enacted by Congress subsequent to the time that an opinion of counsel for the Federal Reserve Board had been published at page 18 of the 1915 Federal Reserve Bulletin holding that a statute of California forbidding a commercial bank to advertise that it received savings did not prevent a national bank in California from advertising that it received savings accounts. The opinion stated in effect that Federal law relating to the establishment and operation of national banks is superior to and controlling over a state law, which might otherwise apply to or govern the operation of national banks; *that on time deposits, it was evident that the right to advertise and solicit such savings accounts was a necessary incident to the exercise of that power and that no state law can interfere with its exercise.*

Thus, inasmuch as it had been held under the provisions of a published legal opinion of a Federal Bureau administering the Federal Reserve Act that the power to hold and pay interest on time deposits by national banks also included the power to accept and pay interest on savings accounts, the 1917 amendment was an approval on the part

of Congress of the principle that national banks could accept such deposits.

This office consistently followed the legal opinion of the Federal Reserve Board subsequent to 1915 and permitted national banks to organize and maintain savings departments and accept savings accounts. In recognition of this practice of national banks, Congress further amended section 24 of the Federal Reserve Act by Act of February 25, 1927, 44 Stat. 1224, to expressly provide that national banks " * * * may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same * * *." (Italics supplied), thus, removing any doubt as to the power of national banks to receive savings accounts.

Therefore, with the right of national banks to accept savings deposits clearly established under powers expressly granted by Congress, it is believed, in conformity with the cases cited above, that any State law which interferes with a national bank in the maintenance of a department in which such deposits are accepted under the title of "Savings Department", or from freely advertising the fact that national banks have the right to accept such savings deposits, is an attempted exercise of authority which expressly conflicts with the laws of the United States and impairs the efficiency of agencies of the Federal Government to discharge the duties for which they were created.

It also should be pointed out that, under section 258 of the laws of the State of New York, quoted above, if national banks were to advertise that they were permitted by Federal law to accept savings deposits, or if national banks in their advertisements would publish *verbatim* the Federal law, expressly granting them the power to receive savings deposits, they would be violating the provisions of section 258 and subjected to a severe penalty if such state statute would be held applicable thereto.

Certainly it cannot be contended either that national banks do not have the right to solicit time or savings deposits which they have the express right, under Federal law, to accept, and upon which their existence depends

(See *First National Bank v. California, supra*) or that national banks do not have the right to publish *verbatim* sections of Federal law under which they operate.

Therefore, it is submitted to you for your consideration, that the opinions of the Attorneys General, noted herein, are in error and that section 258 of the Banking Laws of the State of New York, quoted herein, is of no application to national banks.

Yours very truly,

(S.) C. B. UPHAM,
Deputy Comptroller.

(1598)

FILED

FEB 17 1954

HAROLD B. WILLEY, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

On Appeal from the Court of Appeals of the State of
New York

BRIEF OF APPELLANT

F. GLOYD AWALT,
SAMUEL O. CLARK, JR.,
W. V. T. JUSTIS,

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February 17, 1954

TABLE OF CONTENTS

Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of Facts	3
Specifications of Errors to be Urged	15
Summary of Argument	17
Argument	25
Introduction	25
<p>I. Section 258(1) of the New York Banking Law is in direct conflict with section 24 of the Federal Reserve Act and Section 24 (Seventh) of the National Bank Act which authorize national banks to receive savings deposits and, as a necessary incident to that power, to advertise and conduct its business affairs in such a way as to advise the general public that they are authorized to accept savings deposits 33</p> <p>A. The federal statutes clearly grant national banks the right to accept savings deposits and to advertise 33</p>	

	Page
B. The legislative history of the pertinent federal statutes as well as the general legislative design to equalize State-national bank competition supports the Bank's position	38
C. The administrative construction of the federal laws by the agencies charged with their administration, a construction approved by Congress, supports the Bank's position	44
D. The State statute is in direct conflict with the federal statutes and must yield	50
E. The State is not empowered to impose its own banking standards on national banks. Moreover, the use of the word "savings" by national banks is not deceptive or misleading	58
II. Section 258(1) discriminates against national banks in favor of State institutions and hampers and impairs the efficiency of national banks	73
A. National banks are the necessary instruments of effectuating the nation's monetary policy	73
B. Since savings deposits are an essential element of a national bank's business, any state restrictions affecting the receipt and handling of savings deposits will seriously hamper national banks.	77

Contents Continued.

iii

Page

C. Section 258(1) discriminates against national banks and impairs their ability to compete with state financial institutions 80

D. Section 258(1) unduly interferes with the operations and impairs the efficiency of national banks 88

Conclusion 97

Appendix 99

TABLE OF CASES CITED

Abie State Bank v. Bryant, 282 U.S. 765 95

Alabama v. King & Boozer, 314 U.S. 1 57

Anderson National Bank v. Lockett, 321 U.S. 233
26, 27, 56

Bank of California v. Portland, 157 Ore. 203, 69 P.
2d 273, certiorari denied, 302 U.S. 765 35

Berger v. Chase National Bank, 105 F. 2d 1001, affirmed without opinion, 309 U.S. 632 50

Boatmen's National Bank of St. Louis v. Hughes,
385 Ill. 431, 53 N.E. 2d 403 85

Burnes National Bank v. Duncan, 265 U.S. 17
55, 85, 86

Clement National Bank v. Vermont, 231 U.S. 120
35, 40

Davis v. Elmira Savings Bank, 161 U.S. 275
26, 27, 50, 63

Downey v. Yonkers, 106 F. 2d 69, affirmed, 309
U.S. 590 84-85

	Page
<i>Easton v. Iowa</i> , 188 U.S. 220	20, 26, 50, 51, 52, 53, 54, 61, 63
<i>Easton v. Iowa</i> , 113 Iowa 516, 85 N.W. 795	51
<i>F.D.I.C. v. Tremaine</i> , 133 F. 2d 827	85
<i>Farmers & Mechanics National Bank v. Dearing</i> , 91 U.S. 29	50
<i>Fidelity National Bank & Trust Co. v. Enright</i> , 264 Fed. 236	51, 54, 55
<i>First National Bank v. California</i> , 262 U.S. 366 26, 50, 55, 56, 77	
<i>First National Bank v. Fellows</i> , 244 U.S. 416	61, 84
<i>First National Bank v. Hartford</i> , 273 U.S. 548 ..	84, 88
<i>First National Bank v. Missouri</i> , 263 U.S. 640 ...	27
<i>First National Bank v. National Exchange Bank</i> 92 U.S. 122	35
<i>Florida v. Mellon</i> , 273 U.S. 12	50
<i>Franklin National Bank of Franklin Square v.</i> <i>People of the State of New York</i> , 305 N.Y. 453, 113 N.E. 2d 796	1
<i>Graves v. New York ex rel, O'Keefe</i> , 306 U.S. 466	56
<i>Helvering v. Gerhardt</i> , 304 U.S. 405	56
<i>Helvering v. Reynolds Co.</i> , 306 U.S. 110	47
<i>Helvering v. Wilshire Oil Co.</i> , 308 U.S. 90	47
<i>Hines v. Davidowitz</i> , 312 U.S. 52	50
<i>Inland Waterways Corp. v. Young</i> , 309 U.S. 517 ..	50
<i>Iowa v. Fields</i> , 98 Iowa 748, 62 N.W. 653	52
<i>James v. Dravo Contracting Co.</i> , 302 U.S. 134	56
<i>Jerome v. United States</i> , 318 U.S. 101	37
<i>Kimen v. Atlas Exchange National Bank of Chi-</i> <i>cago</i> , 92 F. 2d 615, certiorari denied, 303 U.S. 650	35
<i>Labor Board v. Gullett Gin Co.</i> , 340 U.S. 361	47

Contents Continued.

v

	Page
<i>Lewis v. Fidelity & Deposit Co.</i> , 292 U.S. 559	27
<i>Mayo v. United States</i> , 319 U.S. 441	57, 59, 60
<i>McClellan v. Chipman</i> , 164 U.S. 347	27
<i>McCulloch v. Maryland</i> , 4 Wheat. 316	25, 26
<i>Mount Pleasant National Bank v. Duncan</i> , Fed. Cas. No. 4804	84
<i>New York v. United States</i> , 326 U.S. 572	57
<i>Oklahoma Tax Commission v. Texas Co.</i> , 336 U.S. 342	56
<i>Osborn v. The Bank</i> , 9 Wheat. 738	25
<i>Penn Dairies v. Milk Control Commission</i> , 318 U.S. 261	57
<i>Pennoyer v. McConnaughy</i> , 140 U.S. 1	49
<i>People v. Binghampton Trust Co.</i> , 139 N.Y. 185, 34 N.E. 898	64, 67
<i>People of the State of New York v. Franklin Na- tional Bank of Franklin Square</i> , 200 Misc. 557, 281 App. Div. 757	1
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218	38, 60
<i>Rushton ex rel. Commissioner of Banking v. Mich- igan National Bank</i> , 298 Mich. 417, 299 N.W. 129	85
<i>Springfield Inst. for Savings v. Worcester, F.S.&L. Ass'n.</i> , 329 Mass. 124, 107 N.E. 2d 315, certiorari denied, 344 U.S. 884	51
<i>Tiffany v. National Bank of Missouri</i> , 18 Wall. 409	84
<i>United States v. 88 Cases</i> , 187 F. 2d 967	92

STATUTES AND OTHER AUTHORITIES CITED

CONSTITUTION: Page

Constitution of the United States, Article VI, Clause 2	20, 50, 62, 99
--	----------------

STATUTES:

Revised Statutes of the United States:

R.S. 5136	10, 16, 34
R.S. 5197	83
R.S. 5219	84

Statutes at Large:

13 Stat. 108	83
17 Stat. 603	72
38 Stat. 270	36, 38, 70
38 Stat. 273	10, 16, 33, 78, 83
39 Stat. 754	41, 47
40 Stat. 239	101
40 Stat. 968	83
42 Stat. 1499	84, 88
44 Stat. 1228	44, 83
44 Stat. 1232	10, 33, 34, 37, 41, 47, 78, 83
46 Stat. 809	83
49 Stat. 714	37, 101
62 Stat. 862	72
64 Stat. 463	83
64 Stat. 873	94

Federal Reserve Act:

Section 19	36, 37, 38, 45, 99
Section 24	2, 4, 11, 15-16, 18, 20, 33, 36, 38, 41, 45, 47, 48, 49, 70, 78, 83, 99

National Bank Act, Section 24 (Seventh)

10, 16, 18, 33, 34, 35, 101

Contents Continued.

vii

Page

United States Code:

Title 12:

Section 24 (Seventh)	10, 16, 33, 34, 35, 101
Section 36	44, 83
Section 85	83
Section 90	83
Section 248(k)	83
Section 371	10, 16, 33, 34, 37, 78, 83, 99
Section 461	70, 99
Section 548	84, 89
Sections 583-588	34, 37
Section 1821a	94

Title 18, Section 709	34, 37, 72
Title 28, Section 1257(2)	2

<i>California Banking Code</i> , Section 3394	45
---	----

Laws of the State of New York:

L. 1858, Ch. 132	64
L. 1875, Ch. 371, Sec. 49	64
L. 1882, Ch. 409, Sec. 283	64
L. 1905, Ch. 564	65
L. 1914, Ch. 369, Sec. 279	66
L. 1932, Ch. 604	67
L. 1934, Ch. 255	67
L. 1938, Ch. 352, Sec. 258	67
L. 1941, Ch. 585	67
L. 1951, Ch. 592	94

<i>Minnesota Statutes</i> , Title 47.23	45
---	----

<i>New York Banking Law:</i>	Page
Section 258(1)	2, 3, 4, 5, 8, 11, 15, 16, 17, 18, 20, 21, 22, 23 24, 25, 27, 28, 30, 33, 38, 45, 47, 49, 50, 52, 58, 62, 63, 73, 80, 82, 86, 88, 89, 90, 94, 96, 97, 102
Sections 230-260	29

MISCELLANEOUS:

Annual Reports of the Comptroller of the Currency:

1926, Pages 2-3	77
1945	75

Annual Report of the Federal Deposit Insurance Corporation, 1952, Page 52 70, 94

Annual Report House and Home Finance Agency, 1952, Page 199 70

Banking Studies (Board of Governors of the Federal Reserve System—1941), Pages 50-51 77

Congressional Record:

Volume 67:

Page 2173	77
Page 2830	39
Page 2839	43, 77
Pages 3246-3247	43, 77

Volume 68:

Page 2171	43
Page 2173	43
Page 5815	43
Page 5818	43

Contents Continued.

ix

Page

Federal Reserve Board Regulations:

Regulation D, 12 C.F.R. § 204.1	37, 103-104
Regulation Q, 12 C.F.R. § 217.1	37, 103-104

Federal Reserve Bulletin:

Volume 1, Page 18	45
Volume 1, Pages 20-21	46
Volume 40, Page 39	79

Kent, Money and Banking (1947), Pages 302-303	77
---	----

McNally's Bankers Directory, 1953 Ed., Page 1091	67
--	----

Member Bank Call Reports:

No. 128, June 1953	76
No. 129, September 1953	75

Opinion of the Comptroller of the Currency, 1939	36, 48, 61
--	------------

Opinions of the Attorney General of New York, 1907	67
--	----

Paton's Digest of Legal Opinions (1940 Ed.) Vol. 1, Page 645	58
--	----

Report No. 38, Dec. 31, 1952, Federal Deposit Insurance Corporation, Page 63	87
--	----

Rules and Regulations for the Federal Savings and Loan Association, 24 C.F.R. §§ 141-148..	87
--	----

	Page
Senate Reports:	
No. 133, 63rd Cong., 1st Sess., Pages 27-28	39
No. 473, 69th Cong., 1st Sess., Page 11	39, 42
No. 781, 82nd Cong., 1st Sess., Pages 25, 28	81-82, 87-88
Sorenson and Sorenson, The Admissibility and Use of Opinion Research Evidence, 28 N.Y. U.L. Rev. 1213-1261	92
The Federal Reserve System—Its Purposes and Functions, 1947, Page 1	74
The Washington Post	40, 41
William E. Dunkman, A Study of Savings and Savings Facilities in New York State, 1941 and 1950, Page 114	79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

On Appeal from the Court of Appeals of the State of
New York

BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of New York, Special Term, Nassau County, is reported in 200 Misc. 557, 105 N.Y.S. 2d. 81. The opinions of the Appellate Division are reported in 281 App. Div. 757, 118 N.Y.S. 2d. 210. The opinions of the Court of Appeals of the State of New York are reported in 305 N.Y. 453, 113 N.E. 2d. 796.

JURISDICTION

This appeal is from the final judgment of the Court of Appeals, the highest court of the State of New York from which a decision in this matter can be had. The petition for appeal was allowed on September 29, 1953. Probable jurisdiction was noted by this Court on December 9, 1953.

The validity of Section 258(1) of the New York Banking Law has been drawn in question on the ground that it is repugnant to the Constitution and paramount laws of the United States and the validity of the State statute has been sustained by the Court of Appeals of the State of New York. Therefore, the jurisdiction of the Supreme Court to review on direct appeal is expressly conferred by Title 28 U.S.C., Section 1257(2).

QUESTION PRESENTED

Is the State of New York empowered to apply Section 258(1) of its Banking Law to a national bank operating in that State and thus prohibit that bank from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public? Otherwise stated, is the State of New York empowered to prohibit a national bank from quoting in its advertisements and in its business dealings with the public the very words of Section 24 of the Federal Reserve Act which expressly authorize national banks to receive and pay interest on "savings deposits"?

STATUTES INVOLVED

The pertinent constitutional provision, statutes and regulations are printed in the appendix to this brief.

STATEMENT

A. Proceedings Prior to Trial.

The Franklin National Bank of Franklin Square (hereinafter usually referred to as "the Bank"), duly chartered as a national bank by the United States, has engaged in the business of banking at Franklin Square, New York, since the year 1926 (Pl. Exs. 34, 35; R. 85, 600-601).

During the year 1947, a Deputy Superintendent of Banks of the State of New York, wrote Arthur T. Roth, President of the Bank, requesting that the Bank cease using the word "savings" in connection with its advertising and other literature used in its banking business (Pl. Ex. 15A-15C; R. 36, 579-580). This request was based on an opinion of the Attorney General of New York which held that the use of the word "savings" by a national bank was a violation of Section 258(1) of the New York Banking Law which specifically prohibits national banks from using the word "savings" in their advertising or banking business and from soliciting deposits as savings banks (Appendix, pp. 102-103).

The Bank sought the advice of counsel upon the right of a national bank to use the word "savings" and was informed that the New York law could not apply to national banks. This information and an opinion of counsel setting forth this conclusion were transmitted to the Deputy Superintendent of Banks. (Def. Ex.

UU; R. 481, 654.) Having been thus advised by counsel, the Bank continued to use the word "savings" in its advertising and in its business dealings with the general public.

On May 12, 1950, the Attorney General of the State of New York (hereinafter usually referred to as "the State") initiated the instant case by filing a complaint in the Supreme Court of New York seeking to enjoin the Bank from using, in alleged violation of the provisions of Section 258(1) of the New York Banking Law, the word "saving" or "savings" or their equivalent in its business and dealings with the public and from soliciting and receiving deposits as a savings bank (R. 3-5). By amended complaint, the State alleged that the use of the prohibited words by the Bank had deceived the public and that the Bank had usurped the exclusive rights of State savings banks and savings and loan associations (R. 85-86).

The Bank filed its answer on June 19, 1950, which, while denying that it had practiced any deception, admitted that it had used the word "saving" or "savings" in its business. By way of affirmative defense, the Bank alleged that the use of the prohibited words was sanctioned by the federal statutes relating to national banking associations and the duly adopted regulations of the Federal Reserve Board. (The answer cited, *inter alia*, Section 24 of the Federal Reserve Act, Appendix pp. 99-101, which specifically authorizes national banks to "continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same.")

The Bank further alleged that, in so far as Section 258(1) of the New York Banking Law purported to prohibit national banks from using the word "saving" or "savings" or their equivalent, the State statute was invalid because it (a) directly conflicted with the Constitution and the paramount laws of the United States, (b) unduly interfered with the operations of national banks located in the State of New York and frustrated the purposes for which they were organized, and (c) unduly discriminated against national banks and substantially handicapped them in their competition with savings banks and savings and loan associations. (R. 5-8, 86.)

B. The Trial.

At the trial of the case,¹ the State offered testimony and numerous exhibits showing that the Bank had used the word "saving" or "savings" in newspaper advertisements, other advertising media, signs displayed in the Bank, deposit and withdrawal slips and annual reports of the Bank (R. 21-38, 38-57; Pl. Exs. 1-13, 17-32; R. 529-579, 581-598C). This evidence was not challenged by the Bank which had freely admitted that it had used the word "saving" or "savings" in its business under the claim that Section 258(1) was invalid as applied to national banks (R. 7).

¹ On July 14, 1950, Special Term, Part I of the Supreme Court of New York entered an order transferring the cause to the Supreme Court, Nassau County, on the ground that, under the National Bank Act, a national bank may be sued only in the county in which it is established (R. 13-15).

The State also sought to show that the Bank had constructed its banking premises so as to simulate the appearance of a savings bank (R. 45-57). This was refuted by the testimony of the Bank's president, Mr. Roth, and the two architects who designed the building showing that in intent and execution the design was unique and was intended to create the impression, in so far as possible, of a department store rather than a bank (R. 87-91, 114-127, 430).²

The Bank adduced evidence in considerable detail that it and other national banks were in direct competition with savings banks and savings and loan associations for savings accounts (R. 135-142, 153-160, 170-171, 407-414). A number of bank presidents testified that this competition was "very intense," that it was "particularly extreme" and was "becoming keener all the time" (R. 137-139, 154-155, 170-171). Even the State's witness, Francis J. Ludemann, Deputy Superintendent of Banks, conceded that national banks were in competition with savings banks saying:

"They are each offering their services, competing for the public's acceptance; if that is what you mean by competition, yes" (R. 332).

The evidence showed that the competition in Nassau County came not only from banking institutions in that

² There were explicit findings by both the Trial Court and the Court of Appeals that the Bank did not simulate, or solicit and receive deposits as, a savings bank (R. 656, 685). We do not anticipate that the State will contend otherwise. See discussion, *infra*. pp. 27-32.

County but from New York City savings banks and from savings and loan associations there and in other parts of the country (R. 409-410). It was shown that savings accounts were solicited by the competing institutions through newspapers, periodicals, radio, television, billboards and various other means (R. 409; Def. Ex. EE, R. 411, 642-642D). The State introduced no evidence contradicting the existence and extent of this competition.

It was also shown on behalf of the Bank—without contradiction by the State—that savings accounts constituted a substantial part of the total resources of the Bank as well as other national banks (R. 436-437, 447; Def. Exs. MM, NN, R. 435, 445, 649, 649-651). Likewise, it was shown that the ability of national banks to make mortgage loans depended directly upon their savings accounts and that large amounts of government bonds were purchased with funds resulting from savings accounts (R. 164, 438, 442).

The Bank's witnesses, with long experience as officers of national banks, testified that New York's statutory prohibition of any use of the word "saving" or "savings" substantially handicapped and burdened national banks and discriminated against them in their competition with savings banks and savings and loan associations (R. 104, 110, 140, 157, 170-171). They also testified that the substitute terms for "savings"—"thrift," "compound interest" or "special interest"—forced upon national banks by the statute, were little understood by the public (R. 140, 152, 157-159, 170-171).

The State, on cross-examination, adduced the information that all of the national banks operated under the direction of these witnesses had prospered during the last ten or more years despite the prohibition set forth in Section 258(1) (R. 105-106, 111-112, 145-148, 168). However, on rebuttal, it was shown that this prosperity was due generally to an increase in money in circulation and rising inflation (R. 112, 447). It was also shown that the ratio of savings deposits to demand deposits in national banks in New York had substantially decreased (R. 152, 449-451).

To prove that the public generally did not understand the meaning of the substitute terms for savings accounts which national banks were compelled to employ under the terms of Section 258(1) and that these terms were misleading and ineffective, the bank introduced in evidence the "Hofstra Survey." This survey, conducted under the auspices of Hofstra College, employed the best techniques yet devised in conducting a survey dealing with public opinion (R. 180-181, 182-226). Briefly stated, the results of this survey showed that 85.8% of those interviewed accurately described "savings account"; whereas only 40.8% correctly described "compound interest account," 21.4% correctly described "special interest account," and 19.5% correctly described "thrift account" (R. 358; Def. Ex. CC, Table I, R. 358, 626). It was also shown that 51.3% of those interviewed knew that savings banks offered savings accounts whereas only 7% knew that national banks offered this service (R. 358; Def. Ex. CC, Table

VII, R. 358, 629-630).³ Moreover, less than 7% knew that national banks handled the other three types of account (*ibid.*). The third phase of the survey showed that 57.7% of those interviewed preferred to open "savings accounts" when they wished to deposit money to earn interest as compared with 21.9% favoring "compound interest accounts," 10.7%, "special interest accounts" and 1.2% "thrift accounts" (R. 358; Def. Ex. CC, Table XIII, R. 358, 634).

It was also developed by the Bank that all mutual savings banks in the State of New York belong to the Federal Deposit Insurance Corporation and all of their deposits are insured in the maximum amount of \$10,000.00 for each account. Furthermore, most savings and loan associations are members of the Federal Savings and Loan Insurance Corporation. (R. 310-313.)

C. The Trial Court's Opinion.

The Trial Court on May 29, 1951, issued its opinion and decision upholding the Bank's position and dismissing the State's complaint. The Court specifically held that the Bank had in no way deceived the public, stating that all allegations in the complaint charging

³ 3.4% answered that a "Federal Bank" handled savings accounts and other answers were broad enough possibly to encompass both savings banks and national banks. Thus, 17.7% answered that any or all banks handled this type of account. See Def. Ex. CC, Table VII, R. 630. In determining these percentages, the persons interviewed were asked to state what kind or what kinds of financial institutions offered the following services; Savings account, compound interest account, special interest account and thrift account.

the Bank with deception or with simulating and holding itself out as a savings bank were completely unfounded, and dismissed these charges (R. 656).

The Trial Court then set forth the evidence adduced at the trial and discussed the constitutional issues involved. It referred to the vigorous competition among banking institutions for deposits. It further referred to the fact, bolstered by the Hofstra Survey and by common knowledge, that the public understands the meaning of the term "savings account" much better than the meaning of the substitute terms forced upon national banks, and that, in the public mind, the term "savings" provokes a much stronger appeal than the substitute terms. (R. 657-658, 662.)

In determining that the State could not deny the use of the word "savings" to national banks, the court expressed its conviction that national banks, which clearly are empowered to advertise, were exercising an implied and incidental power conferred upon them by Acts of Congress (R. S. § 5136, 12 U.S.C. § 24; 38 Stat. 273, 44 Stat. 1232, as amended, 12 U.S.C. § 371) to advertise for "savings deposits" (R. 672).

As the Court said:

"To deny to defendant the right to invite the public by all proper means of expression at its disposal, to make 'savings deposits' with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of financing—in short, to defeat one of the main purposes for which it was created by Congress" (R. 669).

The Trial Court held it evident that the New York and federal laws (Section 258(1) of the New York Banking Law and Section 24 of the Federal Reserve Act) "cannot be read together in harmony. There is a violent conflict of legislative authority." (R. 666.)

The Trial Court further found and held that the New York Statute, in forbidding a national bank to display a sign on its premises containing the word "savings," to indicate its right to receive "savings deposits," to print these words on its deposit slips and pass books, or even to use them in its accounting records, and in forbidding the use of the word "saving" or "savings" in all publicity and advertising, was hampering and embarrassing the Bank and restricting it tremendously in obtaining savings deposits (R. 668).

Because of the conflict between the New York statute and paramount federal law and the effect of the State statute in frustrating the exercise by the Bank of the powers, express and implied, granted national banks by Congress and in defeating the purpose for which they were created, the Trial Court held Section 258(1) of the New York Banking Law invalid and void as applied to the Bank (R. 672).

D. The Opinion of the Appellate Division.

The State appealed the judgment of the Trial Court (R. 1-2). The Appellate Division, with one judge dissenting, reversed the Trial Court's determination and held the State statute constitutional and not in conflict with the federal statutes (R. 679-683). The Appellate Division also reversed the Trial Court's findings of

fact which were inconsistent with its opinion (R. 679). The Bank was permanently enjoined "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank" (R. 676).

E. The Opinion of the Court of Appeals.

The judgment of the Appellate Division was appealed by the Bank (R. 675). The Court of Appeals, by a vote of five to two, modified and affirmed, as modified, the decision of the Appellate Division (R. 684-692). The Court of Appeals found that the Bank had used the word "savings" to bring itself "savings deposits" in competition with savings banks and savings and loan associations in Nassau County and elsewhere (R. 685). However, the Court found no evidence in the record that the Bank had solicited and received deposits as a savings bank and, accordingly, struck from the injunction ordered by the Appellate Division the language "and from in any way soliciting or receiving deposits as a savings bank" (R. 685, 690).

In sustaining the prohibition against the use by the Bank of the word "saving" or "savings" in its advertisements and in its banking or financial business in its dealings with the public, the Court of Appeals upheld the constitutionality of the State statute, expressly rejecting the Bank's contentions to the contrary (R. 686-689). The Court of Appeals found no direct conflict between the pertinent State and federal statutes. It found that the federal statute authorizing national

banks to receive savings deposits was merely "descriptive of a well-known type or kind of bank deposit" and that it did not constitute a "license" to use certain words which are prohibited by the State. (R. 687.) It justified the State prohibition imposed on national banks as forbidding a "misleading description" of the business of receiving savings deposits and paying interest on savings accounts; and as protecting the "citizens against being fooled." Hence, the Court believed the State law could stand despite a "superficial, or seeming, contradiction between the phrasing" of the respective statutes. (*Ibid.*)

The Court referred briefly to the differences between commercial banks, such as the Franklin National Bank, and mutual savings banks and held that, despite the conceded right of national banks to receive savings deposits, any use of the word "saving" or "savings" would deceive people into believing that national banks are mutual savings banks (R. 688). And, in direct conflict with the findings of the Trial Court, the Court of Appeals also concluded that national banks were not impeded in carrying out their lawful purposes by being forced to designate "savings accounts" as "special interest," "thrift" or "compound interest" accounts (R. 688-689).⁴

⁴ The Court of Appeals referred to the fact that the number of "savings type" accounts in national banks had increased and that such banks had enjoyed continued prosperity notwithstanding the challenged State law (R. 689).

The Court emphasized that no other national bank in the State of New York had used the word "saving" or "savings" (R. 688, 689). The record shows the contrary to be the fact (See R. 583).

Finally, the Court of Appeals stated that savings and loan associations are "so similar" in "character and purposes" to mutual savings banks as to justify receiving the same kind of protection offered by Section 258(1) (R. 690).

The effect of the decision of the Court of Appeals modifying the injunction ordered by the Appellate Division was to enjoin the appellant national bank "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public" (R. 678, 690).

In his dissenting opinion (concurring in by Froesel, J.), Fuld, J., found a conflict "patent and irreconcilable" between State and federal law (R. 690). He concluded that the state law necessarily hampered the conduct of banking activities, saying:

"* * * The right to accept 'savings deposits' and maintain 'savings accounts' can mean very little if the bank, by virtue of state statute, must hide that fact or announce it in terms that fail to make it clear. Indeed, to tell a bank that it can receive 'savings deposits' and yet must not publicize the fact is very much like telling a property owner that he may produce vegetables, but must not water or cultivate them." (R. 690.)

Judge Fuld continued:

"The state acknowledges, as, of course, it must, that national banks are empowered, as an incident

of their business, to receive 'savings deposits' and maintain 'savings accounts.' Since those activities are concededly legitimate and in the public interest, there is no basis for the claim that advertising them *in the precise language of the Federal Reserve Act* can be deceptive or harmful. If a national bank conducts only the type of business which the Federal Reserve Act sanctions and if it informs the public of the nature of that business by using only the exact language of the federal enactment, how may it be said—as it is (opinion of Desmond, J., p. 460)—that the state law serves the vital function 'of protecting our citizens against being fooled' ''? (R. 691; the emphasis appeared in the original opinion.)

The Bank filed its Petition for Appeal in the Court of Appeals, State of New York, on September 29, 1953, and the Order Allowing the Appeal was signed by Chief Judge Edmund H. Lewis on the same day (R. 697-698). The appeal papers were docketed in this Court on October 22, 1953. This Court then noted probable jurisdiction in an Order dated December 7, 1953 (R. 701).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding the New York statute, Section 258(1) of the New York Banking Law, constitutional against the contention that the statute directly conflicts with the purposes of Congress and the paramount federal laws, particularly as expressed in Section 24 of the Fed-

eral Reserve Act as amended (38 Stat. 273, as amended, 12 U.S.C. § 371) and Section 24(Seventh) of the National Bank Act as amended (R.S. § 5136, as amended, 12 U.S.C. § 24(Seventh)).

(2) In holding and concluding that Section 24 of the Federal Reserve Act neither expressly nor inferentially empowers national banks to advertise or in any way publicize the fact that they may accept "savings deposits," although the statute expressly authorizes national banks to accept such deposits.

(3) In holding and concluding that national banks, although empowered to advertise the services which they legitimately may provide, must conform their advertising to a State statute which prohibits use of the very words employed in the enabling federal legislation.

(4) In holding and concluding that the appellant engaged in "a misleading description" of its business and uses "deceptive verbiage" in characterizing savings deposits as "savings deposits" in its advertising although Section 24 of the Federal Reserve Act so characterizes certain of the deposits which national banks are expressly empowered to accept.

(5) In holding and concluding that Section 258(1) of the New York Banking Law does not, in violation of the Federal Constitution, unduly impede national banks in carrying out their lawful purposes and that the admittedly legitimate national banking activity of taking savings deposits is not substantially interfered

with by the State's prohibition of the use of the words "saving," "savings" or their "equivalent."

(6) In holding and concluding that Section 258(1) of the New York Banking Law does not unduly discriminate against national banks and handicap them in their competition with savings and loan associations and savings banks.

(7) In permanently enjoining the Franklin National Bank of Franklin Square "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public."

SUMMARY OF ARGUMENT

This case involves an attempt by the State of New York to apply Section 258(1) of its Banking Law to a national bank. The State statute prohibits any bank, including specifically a national bank, other than a State mutual savings bank and certain other financial institutions, from using the word "savings" in its banking or financial business or in any advertisement, or from soliciting or receiving deposits as a savings bank. The Appellant, a national bank, upon advice of counsel that the law was unconstitutional and void as applied to it, had employed the word "savings" in good faith to solicit savings deposits and in its banking business. The attempt by the State to show that such use of the word "savings" was, in fact, misleading was completely unsuccessful; both the Trial Court and the Court of Appeals held that no issue of actual deception remained in the case.

L

SECTION 258(1) OF THE STATE LAW IS IN DIRECT CONFLICT WITH SECTION 24 OF THE FEDERAL RESERVE ACT AND SECTION 24 (SEVENTH) OF THE NATIONAL BANK ACT.

A. The Federal Statutes Clearly Grant National Banks the Right to Accept Savings Deposits and to Advertise.

Section 24 of the Federal Reserve Act explicitly authorizes national banks "to continue hereafter as heretofore to receive time and savings deposits," and Section 24(Seventh) of the National Bank Act authorizes national banks to exercise all incidental powers necessary to carry on the business of banking. Accordingly, The Franklin National Bank is clearly authorized to receive savings deposits and to inform the general public, by means of appropriate advertising, that it possesses such authority. The most appropriate and effective means of accomplishing this is to employ the term of ordinary meaning—"savings"—which Congress itself had used in granting the authority. In view of these considerations, and since the right to receive savings deposits and use the word "savings" was not made dependent in any way on State law, the State's position that it is empowered to prohibit a national bank from quoting in its advertisements and in its business dealings with the public the very words of Section 24 of the Federal Reserve Act is clearly untenable.

B. The Legislative History of the Pertinent Federal Statutes. As Well as the General Legislative Design to Equalize State-National Bank Competition, Supports the Bank's Position.

The legislative history of the 1927 amendments to the Federal Reserve Act, as well as of the original Act, reveals that Congress was well aware that many national banks had long maintained savings departments as an important component of their banking business. The savings business of national banks had grown to such proportions by 1927 that Congress found it necessary to enlarge their statutory powers by lengthening the permitted term of specified real estate loans and by increasing the over-all amount of such loans which a bank could make. The stated Congressional purpose of these and other specified amendments enacted in 1927 was to carry out the established Congressional policy of promoting competitive equality between national and State banks. Accordingly, the inclusion by Congress in 1927 of the authority to continue to receive savings deposits at the same time that it was broadening the powers of national banks and strengthening their ability to compete with State banks contradicts any intention to subordinate the use by national banks of the word "savings" to State control.

C. The Administrative Construction of the Federal Laws by the Agencies Charged with Their Administration, a Construction Approved by Congress, Supports the Bank's Position.

The position of The Franklin National Bank that it is authorized to advertise for savings accounts is entirely consistent with an administrative ruling of the

Federal Reserve Board in 1915 that a California statute, construed by the State to subject national banks to penalties for advertising for savings accounts, was not enforceable against such banks. Since Congress re-enacted Section 24 of the Federal Reserve Act several times subsequent to the publication of this ruling, it must, under the re-enactment rule, be deemed to have approved this construction and to have given it the force of law.

In addition, the Comptroller of the Currency has considered the precise question here involved and has ruled that national banks in New York are authorized to advertise for savings, notwithstanding the prohibition contained in Section 258(1) of the New York Banking Law.

Where there is no statutory indication that these administrative rulings are incorrect and where they have been consistently adhered to and followed for a long period of time, they are entitled to great respect and should ordinarily control the construction of the statute.

D. The State Statute is in Direct Conflict with the Federal Statutes and Must Yield.

The New York statute directly conflicts with paramount federal law and must yield (Article VI, Clause 2, Constitution of the United States). The leading case of *Easton v. Iowa*, 188 U.S. 220, is particularly pertinent. There, in the face of arguments strikingly similar to those advanced here in support of the New York law, this Court held an Iowa statute invalid as

applied to national banks. It was held that Congress had provided a symmetrical and complete scheme for national banks and that it was not competent for the State legislature to interfere, either with hostile or friendly intentions. Decisions of this and other courts dealing with similar State attempts to regulate the affairs of national banks support this holding.

E. The State is Not Empowered to Impose Its Own Banking Standards on National Banks. Moreover, the Use of the Word "Savings" by National Banks is Not Deceptive or Misleading.

National banks are subject to comprehensive regulation by the Comptroller of the Currency under the authority of Congress and, in the instant case, that officer has sanctioned the use by national banks in the State of New York of the words prohibited by the New York statute. Therefore, irrespective of the purposes or motives of the New York Legislature, it is not competent for the State to impose supplementary regulation of the use of the words by national banks.

The history and application of Section 258(1) illustrate that a principal purpose of the law was to prevent the simulation of a savings bank by other banks. Of this charge, the Bank was explicitly cleared. As to the law's avowed purpose of preventing fraud and deception, the law contains contradictions and inconsistencies. The effort of the State to identify the word "savings" exclusively with mutual savings banks must fail since, by the very language of the statute, the term is not reserved for mutual savings banks but its use is authorized by other financial institutions. Further-

more, the State's efforts to identify the word "savings" with mutual savings banks conflicts with the Congressional use of the word with regard to national banks and with the authorized administrative definition of the term. The Bank has used the word "savings" only in a manner consistent with the Congressionally authorized definition of the term in its advertising and in its business. It is curious that a law purportedly enacted to prevent fraud and deception forces national banks to employ substitute expressions for "savings" which the record shows are not understood by, but on the contrary have a tendency to mislead, the general public.

II.

SECTION 258(1) DISCRIMINATES AGAINST NATIONAL BANKS IN FAVOR OF STATE INSTITUTIONS AND HAMPERS AND IMPAIRS THE EFFICIENCY OF NATIONAL BANKS.

A. National Banks are the Necessary Instruments of Effectuating the Nation's Monetary Policy.

Congress, by the Federal Reserve Legislation, has created a reserve system of central banking under the control of the Board of Governors of the Federal Reserve. The Board in large part exercises its powers of control over the nation's monetary policy through control of reserves of member banks, both State and national. However, since State member banks may withdraw from the Federal Reserve System at any time, the Board must rely primarily upon national banks, required by law to be members, as the means to carry out its policies. National banks, moreover, hold a substantial amount of all the assets of commer-

cial banks; accordingly, any attempt by a State to impair the efficiency of national banks will, in turn, impair the Federal Reserve System's ability to control the nation's monetary policy.

B. Since Savings Deposits are an Essential Element of a National Bank's Business, any State Restrictions Affecting the Receipt and Handling of Savings Deposits will Seriously Hamper National Banks.

The success of all commercial banks, including national banks, obviously depends on their ability to obtain deposits. These deposits are essential to the lending functions of banks, and savings deposits are especially important since real estate loans, which are dependent upon savings deposits, are a profitable source of income. Thus, any State action interfering with the receipt of deposits by national banks tends to impair their efficiency and their ability to compete with State institutions.

C. Section 258(1) Discriminates Against National Banks and Impairs Their Ability to Compete with State Financial Institutions.

Competition between national banks, commercial banks, mutual savings banks and State and federal savings and loan associations is intense, particularly in the area in which The Franklin National Bank is located. The State prohibition against the use of the word "savings" discriminates against national banks and places them under a handicap in their competition with the privileged institutions.

Long aware of State attempts to accord privileges to their own institutions, Congress has frequently moved

to prevent State discrimination against national banks and to place such banks on a plane of competitive equality with State banks. Such acts of Congress were designed, not as an indication that national banks were subject to or subordinate to State law, but frequently as a liberalization of restrictive federal legislation regulating national banks to enable them to compete more effectively with State institutions. This Court has frequently recognized and supported this Congressional policy.

The contention that mutual savings banks and savings and loan associations are different from national banks is not relevant to the issues here involved. In an important phase of their respective operations—the soliciting and obtaining of the savings of the public—savings banks and savings and loan associations are in direct competition with national banks. It is in this competition that the State law discriminates against national banks in favor of the privileged institutions. This the State cannot do under the decisions of this Court.

D. Section 258(1) Unduly Interferes with the Operations and Impairs the Efficiency of National Banks.

The contention that the New York law does not interfere with the operations or impair the efficiency of national banks is erroneous. It was convincingly demonstrated at the trial of this case that the use of the equivalent terms for “savings”—“compound interest,” “special interest” and “thrift”—was ineffective and that the expressions were not understood by the public. National banks have lost and are continuing

to lose depositors because such banks are not able to advise the general public that they accept savings deposits. The Court of Appeals' answer to this interference with national banks—that such banks have prospered, notwithstanding the prohibitions of Section 258(1)—is immaterial to the issues of this case since it is obvious that deposits might increase despite statutory handicaps. Indeed, the increase in deposits was shown to be due to inflation and an increased money supply. Moreover, the ratio of savings deposits to demand deposits in national banks in New York had substantially decreased.

Since the New York law unduly interferes with the operations and impairs the efficiency of national banks, it must, under the decisions of this Court, be held unconstitutional and invalid as applied to national banks.

ARGUMENT

Introduction

The Court of Appeals of the State of New York in reaching its erroneous decision, did, however, recognize certain basic principles of law which have evolved from this Court's long experience with the problem of the federal-state relationship to a central or national banking system.

It has long been settled that Congress has the power under the Constitution to charter and regulate national banks. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. The Bank*, 9 Wheat. 738. The opinions of Chief Justice Marshall in these two cases, which effectively stifled early attempts by the States through ruinous

taxation to destroy the Bank of the United States, laid down the basic foundation on which the law dealing with national banks has been erected. In *McCulloch v. Maryland*, the Chief Justice stated:

“* * * the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.” (*McCulloch v. Maryland*, 4 Wheat. 316, 436.)

The application of this statement to national banks was particularized by this Court in *Davis v. Elmira Savings Bank*, 161 U. S. 275, where it was held as “axiomatic” that any attempt by a State to define the duties or control the conduct of national banks was absolutely void wherever such attempted exercise of authority conflicted with the laws of the United States and either frustrated the purpose of the national legislation or impaired the efficiency of those banks to discharge the duties for the performance of which they were created. See also to the identical effect, *Easton v. Iowa*, 188 U.S. 220; *First National Bank v. California*, 262 U.S. 366; *Anderson National Bank v. Lockett*, 321 U.S. 233.

On the other hand, it is also clear that, generally, national banks are subject to the nondiscriminatory laws of the State in which they are located unless those laws interfere with the purposes of their creation, tend to im-

pair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States. *Davis v. Elmira Savings Bank*, *supra*; *McClellan v. Chipman*, 164 U.S. 347; *First National Bank v. Missouri*, 263 U.S. 640; *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559; *Anderson National Bank v. Lockett*, *supra*.

In the light of these basic principles, we shall show (1) that Section 258(1) of the New York Banking Law is in direct conflict with the paramount laws of the United States authorizing national banks to receive savings deposits and with the rulings of the administrators to whom Congress has delegated the power of regulating the affairs of national banks, and (2) that the State law discriminates against national banks in favor of State institutions and hampers and impairs the efficiency of national banks in carrying out the functions for which they were created.

Before we enter upon our discussion of these independent grounds showing the invalidity of the State law, we believe it advisable to comment on the attempt of the State to make the central theme of its defense of the law its claim that the purpose of the law is to prevent "fraud," "deception," and "misleading advertising," and to prevent the citizens of the State from being "fooled," a purpose which allegedly is being subverted by the activities of the Bank which the State has caused to be enjoined. These emotion-provoking words and phrases permeated the written and oral arguments of the State in this case before the courts of

the State of New York. And these expressions were repeated (although in much less vehement fashion) in the opinions of the Appellate Division and of the Court of Appeals.

The references to deceptive practices should be clarified and the use of the related expressions must be understood in their proper context. As the Trial Court held, the issue at bar is not one of "wrongdoing" but is simply a test whether the Bank may exercise a power which the State would deny to it (R. 656). This is the proper complexion of this case; it was not changed but was indeed upheld by the Court of Appeals, as we shall now show.

The pertinent language of Section 258(1) of the New York Banking Law is as follows:

"No bank, trust company, national bank, * * * other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; * * *."

This law may be broken down into three separate components: (1) Prohibiting a national bank from using the words "saving" or "savings" or their equivalent "in its banking or financial business";

(2) prohibiting a national bank from using those words in any advertisement; and (3) forbidding a national bank to "in any way solicit or receive deposits as a savings bank." Considering the third prohibition, the Trial Court in the instant case, in carefully reasoned language, held that this provision of the statute prohibits a national bank from "simulating a New York savings bank for purposes of deception" (R. 667). In other words, if a national bank should attempt to deceive the public and solicit deposits by palming itself off as a savings bank organized under the laws of the State of New York (Sections 230-260, New York Banking Law), the sanction of the New York statute obviously would apply to such a bank.

The State, by resorting to extravagant language in its complaint alleging that the Bank had practiced fraud and deception on the public, attempted to apply this portion of the New York statute to the Bank (R. 4, 86). But the attempt proved an utter failure (R. 656, 657). There was not a scintilla of evidence offered by the State that the Bank had practiced any deception, intentional or otherwise. The State unsuccessfully sought to show that the Bank had reconstructed a portion of its banking premises so as to simulate the appearance of a savings bank (R. 656). The Bank, however, as the Trial Court found, proved that the architects and builders were instructed to, and did, erect a building which resembled not a savings bank but (as a unique innovation in banking construction) a department store (R. 656). Accordingly,

on the entire record, the Trial Court emphatically dismissed any charges of fraud or deception (R. 656, 657, 667).

The findings and decision of the Trial Court on this aspect of the case were upheld in every particular by the Court of Appeals. In refusing to affirm that part of the injunction issued by the Appellate Division enjoining the Bank from "in any way soliciting or receiving deposits as a savings bank," the Court of Appeals said:

"* * * However, we find in the record no evidence at all that defendant has violated, or threatens or intends to violate, the other prohibition of the above-quoted statute, which runs against 'soliciting or receiving deposits as a savings bank'. Therefore, so much of the injunction as prohibits 'soliciting or receiving deposits as a savings bank' is unwarranted and must be stricken regardless of anything else in the case." (R. 685.)⁵

Since the State has not challenged this action of the Court of Appeals, it cannot claim that the Bank

⁵ The Appellate Division issued an injunction under this part of Section 258(1) without imputing any conscious fraud or deception to the Bank and without in any way implying that it had simulated a savings bank (R. 679-682). When it reversed the Trial Court, the Appellate Division apparently issued the injunction in the terms of the State statute without considering that the evidence completely failed to support the application of this portion of the statute to the Bank.

practiced any fraud or deception by attempting to simulate a savings bank and no issue remains in this case stemming from the portion of the language of the statute which forbids such acts. Accordingly, no claim can be made herein by the State that the Bank acted otherwise than in complete good faith in asserting what its officers believed, consistent with the advice of counsel, were its rights under the laws of the United States.

The Bank's activities concededly conflicted with the first two parts of the statute which prohibit every use of the words "saving" or "savings" in (1) its banking or financial business and (2) any advertisement. In advancing its reasons why these portions of the law are valid as applied to a national bank, the State argued below at great length that the New York legislature had determined that any use of the forbidden words by a national bank would inevitably "deceive" and "mislead" the public into believing that such a bank, although chartered under the laws of the United States and bearing clear indicia of its national creation in its name, was a savings bank created under the laws of the State of New York. The State claimed that all questions of good faith on the part of the Bank or of the absence of any intention to deceive were entirely irrelevant.

The Court of Appeals agreed with the State's version of the legislative intent since it upheld the application of the statute to the Bank without any finding and without any evidence that the Bank had acted other-

wise than in good faith or with any intent to deceive the public. The Court of Appeals, therefore, treated the State's statute as tantamount to a legislative finding that any use by a national bank of the word "savings," despite the fact that Congress specifically authorized national banks to receive savings deposits, was *per se* a deceptive practice which the State could enjoin. In other words, the Court holds, consistent with the argument of the State, that the statute erects an irrebuttable presumption that, notwithstanding the *bona fides* of a national bank and notwithstanding the ability or lack of ability of the citizens of the State of New York to comprehend the distinction between a national bank and a State savings bank, any use of the forbidden words by the federal instrumentality is deceptive and misleading. It is only in this context and with this meaning that the terms have been used by the Court of Appeals and not in the sense that there was any actual misleading of the public or any wrongdoing on the part of the Bank. We shall consider below this claimed basis for the application of the challenged New York statute to this national bank. As we there develop (pp. 64-73, *infra*), the New York statute does not serve its asserted purpose, but actually serves as a competitive weapon employed to great advantage by State-created mutual savings banks and by savings and loan associations in their competition with national banks in the State of New York.

L

SECTION 258(1) OF THE NEW YORK BANKING LAW IS IN DIRECT CONFLICT WITH SECTION 24 OF THE FEDERAL RESERVE ACT AND SECTION 24 (SEVENTH) OF THE NATIONAL BANK ACT WHICH AUTHORIZE NATIONAL BANKS TO RECEIVE SAVINGS DEPOSITS AND, AS A NECESSARY INCIDENT TO THAT POWER, TO ADVERTISE AND CONDUCT ITS BUSINESS AFFAIRS IN SUCH A WAY AS TO ADVISE THE GENERAL PUBLIC THAT THEY ARE AUTHORIZED TO ACCEPT SAVINGS DEPOSITS.

A. The Federal Statutes Clearly Grant National Banks the Right to Accept Savings Deposits and to Advertise.

The Court of Appeals of the State of New York found that Section 258(1) of the New York Banking Law did not conflict with Section 24 of the Federal Reserve Act (read in conjunction with Section 24(Seventh) of the National Bank Act) "despite a superficial, or seeming, contradiction between the phrasing of the two enactments" (R. 687). In pertinent part, Section 24 of the Federal Reserve Act reads as follows:

"* * * Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located." (38 Stat. 273, 44 Stat. 1232, as amended, 12 U.S.C. § 371.)

And Section 24 (Seventh) of the National Bank Act provides:

“To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; * * * by receiving deposits; * * *.” (R.S. § 5136, 12 U.S.C. § 24 (Seventh).)⁶

It is submitted that the conflict between the State law and the paramount federal law is, in the words of Judge Fuld, who dissented in the Court below, “patent and irreconcilable” (R. 690). Judge Fuld convincingly pointed out that the right of a national bank to accept savings deposits becomes meaningless if the State can compel a bank to conceal that fact. As Judge Fuld so pungently stated: “Indeed, to tell a bank that it can receive ‘savings deposits’ and yet must not publicize the fact is very much like telling a property owner that he may produce vegetables but must not water or cultivate them” (R. 690).

The right of a national bank to receive savings deposits is explicitly and unequivocally granted (44 Stat. 1232, 12 U.S.C. § 371). Can it be denied that national banks lack the power to advertise that fact?

⁶ The Court also found no conflict with former Sections 583-588 of Title 12 United States Code, now 18 U.S.C. 709, covering certain phases of advertising by national banks and other banking institutions. See footnote 8, *infra*, p. 37.

Can it be assumed that a national bank cannot invite the public to deal with it by quoting the very language of the Federal Reserve Act? These powers are clearly incidental powers that are, within the meaning of Section 24 (Seventh) of the National Bank Act, necessary to carry into effect those specifically granted by Congress—including, as one of the explicit powers set forth in that section, the receiving of deposits. And, of course, deposits as so used in Section 24 (Seventh) of the National Bank Act must include savings as well as demand deposits. Cf. *Kimen v. Atlas Exchange National Bank of Chicago*, 92 F. 2d 615, *certiorari denied*, 303 U.S. 650. A national bank possesses such powers as are requisite for the efficient attainment of the purposes for which it was created. *Clement National Bank v. Vermont*, 231 U.S. 120, 140; *First National Bank v. National Exchange Bank*, 92 U.S. 122, 127; *Bank of California v. Portland*, 157 Ore. 203, 69 P. 2d 273, *certiorari denied* 302 U.S. 765.

Since national banks are expressly authorized by Congress to receive and pay interest on "savings deposits," Congress must have intended that the public be informed of this authorized banking function if such business is to be obtained. The appropriate means, naturally, is advertising, and the most appropriate manner of advertising is to employ the words of ordinary meaning which Congress itself had used.

In granting the power to receive savings deposits, Congress used the word "savings" not once, but several times (see Appendix pp. 99-101). Moreover, the

inclusion of the word in 1927 was deliberate. Prior to that time, Section 24 of the Federal Reserve Act had merely provided for the receipt of "time deposits." Since "time deposits" had been defined in Section 19 of the original Federal Reserve Act (38 Stat. 270) to include "savings accounts," the express inclusion by Congress of the authority to continue to receive "savings" deposits was clearly designed to give particular emphasis to this power and to eliminate any possible doubt, if any did exist, that a national bank could receive such deposits.⁷

It is significant that the grant of power to receive savings deposits is general and may be exercised without reference to the laws of the several States. Thus, the maximum amount which may be received from any savings depositor, whether such a depositor may be a firm or a corporation as well as an individual, and the manner of withdrawal are in no way dependent upon the law of any State. And, most significantly, the manner of soliciting or designating such deposits is not made dependent in any way on the laws of any State. If Congress had intended that national banks should be regulated and controlled by State law in their solicitation of savings deposits, it obviously would have so provided, just as it did by the provision in the very same statute relating to the payment of interest on

⁷ See opinion of the Comptroller of the Currency dated July 10, 1939, set forth in Appellant's Statement as to Jurisdiction filed herein, page 54, at pages 58-59. See also discussion of the legislative history, *infra*, pages 38-44.

"savings" and other deposits. It is there provided that the rate of interest payable by a national bank on such deposits "shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which the national bank is located." (44 Stat. 1232, as amended, 12 U.S.C. § 371). The failure similarly to limit the solicitation of savings deposits calls for the application of the rule of *expressio unius est exclusio alterius*.⁸ Likewise applicable is the general assumption that Congressional acts are deemed to have general application and are not dependent upon State law unless there is plain indication to the contrary. *Jerome v. United States*, 318 U.S. 101, 104.

Moreover, it is significant that Congress amended Section 19 of the Federal Reserve Act in 1935 to authorize the Board of Governors of the Federal Reserve System to define "savings deposits" for the purpose of applying various provisions of the Act (49 Stat. 714, see Appendix, p. 101). Pursuant to this specific authority, the Board of Governors has issued its detailed Regulations D and Q defining "savings deposits," which regulations are applicable to national banks and all other member banks of the System (12 C.F.R. §§ 204.1, 217.1, see Appendix, pp. 103-104). This

⁸ It should be observed that in Section 583-588 of Title 12, United States Code (now 18 U.S.C. 709), the use by banks (and others) of certain terms in advertising or in any other way is expressly prohibited. But there is no prohibition of the use by national banks of the word "savings," nor is any use of the term made to turn upon the laws of the States.

delegation of authority to the Board to define "savings deposits," which it has exercised by issuing these regulations, affords added proof of the Congressional design to occupy the field and leave no room for State control over the use of the term "savings deposits." See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218.

It thus appears that Congress intended that national banks be empowered to advertise for savings deposits and to do so in the manner most appropriate and most effective—by quoting the precise language used by Congress—without the necessity of subjecting the use of the particular language to the control of the States. It follows that Section 258(1) is in conflict with the paramount federal law.

B. The Legislative History of the Pertinent Federal Statutes as Well as the General Legislative Design to Equalize State-National Bank Competition Supports the Bank's Position.

As we have stated, Congress in 1927 amended Section 24 of the Federal Reserve Act to authorize national banks to "continue hereafter as heretofore to receive time *and savings* deposits and to pay interest on the same" by adding the words "and savings," thereby specifically recognizing that national banks had been accepting savings deposits for some time. Indeed, in enacting the Federal Reserve Act in 1913, Congress expressly defined "time deposits" as including "savings accounts" (Section 19, Federal Reserve Act, 38 Stat. 270). The legislative history of that act reveals that the Senate Report of the Committee on Banking and Currency

stated that "national banks now, through the system of time deposits, carry on a savings-bank business" (Sen. Rep. No. 133, 63rd Cong., 1st Sess., pp. 27-28). Thus, it appears that the long history of the operations of savings departments by national banks was well known to Congress.

The extensive nature of the savings business of national banks was revealed by the Senate Report on the 1927 amendments to the Federal Reserve Act which stated that national banks then had about \$5,000,000,000 of savings deposits from 11,000,000 depositors (Sen. Rep. No. 473, 69th Cong., 1st Sess., p. 11).⁹ In the light of this extensive and long standing practice of national banks of soliciting and receiving savings accounts, there is no justification for the Court of Appeals' reference to the 1927 amendatory legislation dealing with "savings deposits" as being "merely descriptive of a well-known type or kind of bank deposits" (R. 687). Instead, as we have stated, the

⁹ Congressman McFadden, discussing the 1927 amendments on the floor of the House of Representatives, used slightly increased figures, stating:

" . . . There are on deposit to-day in the national banks a total of savings deposits to an amount of \$6,000,000,000, which is about one-fourth of the entire sum held on savings deposits by all banks in the United States. There are nearly 12,000,000 individual savings depositors in national banks, constituting nearly one-third of all of the persons carrying money in savings deposits in all banks. These figures do not include commercial time deposits, but strictly savings." (67 Cong. Rec. 2830; emphasis supplied.)

legislation embodied Congress' deliberate intention to authorize national banks specifically to operate a savings business by receiving savings deposits, paying interest thereon and making real estate loans up to the specified maximum percentage of such deposits.

In view of the obvious importance to national banks of their savings business, it is not open to doubt that, when Congress in 1927 expressly authorized those banks to continue as they had theretofore to receive savings deposits, Congress intended, as a necessary incident to this express authorization, to empower national banks to continue as they had theretofore to advertise for "savings deposits."¹⁰

It can hardly be denied that national banks were extensively advertising for savings accounts during the period when the 1927 amendments to the Federal Reserve Act were being considered. A quick search of the issues of *The Washington Post* for the period December 1, 1926, through February 28, 1927 (the 1927 amendments were approved on February 25, 1927), reveals that no less than thirty-six advertisements were published in that newspaper by not less than five national banks in Washington, D. C., during that period

¹⁰ An early example of advertising by a national bank for savings deposits appears in an opinion of this Court in 1913 which quoted the following advertisement published by the Clement National Bank of Rutland, Vermont: "We pay 4 per cent. on *savings accounts*" *Clement National Bank v. Vermont*, 231 U.S. 120, 139. This Court observed that the practice of national banks in maintaining savings departments had become extensive and had not been challenged by the Government (*ibid.*).

in which solicitation for savings deposits was made and the word "savings" specifically employed.¹¹

Another phase of the legislative history of the 1927 amendments to Section 24 of the Federal Reserve Act is significant in revealing the Congressional intent that national banks be empowered to receive savings deposits and to make real estate loans in full and open competition with all types of banks. These amendments increased the time limitation for loans on real estate other than farm lands from one year to five years and increased the amount national banks could lend on this type of security from twenty-five per centum of capital and surplus or one-third of time deposits to twenty-five per centum of unimpaired capital and twenty-five per centum of unimpaired surplus or one-half of its savings deposits. (39 Stat. 754, 44 Stat. 1232.) The purpose of these amendments enlarging the authority of national banks to invest in real estate mortgages, as appears from the Senate Report, was to per-

¹¹ A few examples of these advertisements are as follows (all citations are to the indicated issues of *The Washington Post*): "3% paid on savings accounts • • • Whether you maintain a Checking account, a Payday Savings account, or both, your patronage will be appreciated." National Metropolitan Bank, February 15, 1927, p. 15; "The Federal-American Has a Big Savings Department." Federal-American National Bank, February 22, 1927, p. 11; "Our Savings Dept. invites initial deposits of One Dollar or more." National Metropolitan Bank, January 30, 1927, p. 28; "Join Our 1927 Christmas Savings Club Now." Second National Bank, December 16, 1926, p. 15; "We pay more interest on savings accounts • • • come in and let us explain." Commercial National Bank, February 13, 1927, p. 27.

mit such banks to compete more effectively with State banks which received savings deposits. The Report stated:

"The State banks and trust companies are authorized to make long-time loans upon the security of first mortgage upon city real estate. National banks, by being limited to a one-year period, have found themselves handicapped in meeting the demands of their customers in this respect. This section limits all such loans to an amount not exceeding one-half of the savings deposits in the bank and thereby relates the real estate loan business to savings deposits. This is a logical connection. National banks have on deposit about \$5,000,000,000 of savings deposits from about 11,000,000 depositors. This constitutes a large proportion of the entire savings business in the United States and it has become necessary to recognize the right of a national bank with certain definite restrictions to use these funds in the same general manner in which the State banks and trust companies are using them, which includes the right to make loans upon city property, as provided above." (Sen. Rep. No. 473, 69th Cong., 1st Sess., p. 11.)

Perhaps the most pointed expression of the underlying Congressional purpose of the 1927 amendments to place national banks on a competitive plane of equality with other banks was that of Congressman

McFadden, sponsor of the bill. After passage of the Act, he said:

"As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal reserve system.

* * * * *

"First, section 16 amends section 24 of the Federal reserve act *and authorizes a national bank by statutory enactment to carry on a savings bank business* and lend money on the security of real estate." (68 Cong. Rec. 5815, 5818; emphasis supplied.)¹²

Congress, as we develop later, has adhered faithfully since the National Bank Act was adopted in 1864 to a well defined purpose to equalize competition between national banks and State banks and other banking institutions.¹³ Congress adhered consistently to this

¹² For other Congressional statements during debates on the 1927 amendments showing the intent of Congress to place national banks on an equal competitive plane with all State banks and banking institutions, see 67 Cong. Rec. 2839, 3246-3247; 68 Cong. Rec. 2171, 2173, 5815.

¹³ We discuss *infra*, pages 82-85, the numerous statutes which Congress has enacted to insure that national banks shall enjoy an equal competitive position with State competitors. We also there discuss this Court's recognition in a number of decisions of this Congressional design.

legislative design in 1927 by seeking, through the amendments discussed above, and others,¹⁴ to improve the competitive position of national banks in areas where those banks had previously operated at a disadvantage *vis-a-vis* the State banks. Accordingly, when Congress included the right to receive savings deposits at the very same time that it was broadening the powers of national banks and strengthening their ability to compete on equal terms with State banks, it cannot be assumed that Congress intended to restrict the use of the word "savings" by national banks or to subordinate their use of that term in any aspect of their banking business or their dealings with the public to the control of the States.

C. The Administrative Construction of the Federal Laws by the Agencies Charged With Their Administration, a Construction Approved by Congress, Supports the Bank's Position.

The deliberate inclusion by Congress in the 1927 amendments of the right of national banks to receive savings deposits is particularly significant when considered in the light of the long maintained position of the Federal Reserve Board that the States were not empowered to forbid national banks to advertise for "savings" deposits. The Board's administrative

¹⁴ To equalize the competitive position between national banks and State banks, Congress authorized national banks to operate branches in those States where State banks, defined to include trust companies, savings banks, or other such corporations or institutions carrying on a banking business, were authorized to operate branches. 44 Stat. 1228, as amended, 12 U.S.C. § 36.

position on this question was first published in 1915 (1 Fed. Res. Bull. 18). Its ruling dealt with a California statute which, like Section 258(1) of the New York Banking Law, prohibited any bank not authorized to do a saving bank business by the State from advertising for "savings" deposits.¹⁵ The ruling was prompted by a notice of the Superintendent of Banks of the State of California that he would seek to impose the penalties prescribed by the California law on national banks. It will be recalled that at that time (1915), Section 24 of the Federal Reserve Act provided that national banks "may continue hereafter as heretofore to receive time deposits and to pay interest on the same," and that Section 19 of the Act defined "time deposits" to include "savings accounts * * * subject to not less than thirty days notice before payment."

The Federal Reserve Board held that, since national banks possessed the power to receive "time deposits" which were defined to include certain "savings accounts," the right to advertise for such accounts would seem to be a necessary incident to the exercise of that

¹⁵ The California statute discussed in this 1915 ruling has been continued to the present time with some modification of language. Section 3394, California Banking Code, quoted in Appellant's Statement as to Jurisdiction filed herein, page 53. Minnesota has a law similar to Section 258(1), New York Banking Law. Title 47.23, Minnesota Statutes, quoted in Statement as to Jurisdiction, page 53. It should be noted that, unlike the New York law, neither the California nor the Minnesota statute specifies by its very terms that it applies to national banks.

power and that, consequently, the California statute could not be enforced against them.

The ruling stated:

"Inasmuch, therefore, as Congress has the right to authorize national banks to charge interest on accounts and to include in such accounts what are generally known as 'savings accounts,' and since it has exercised this right, it would seem that the California statute referred to cannot properly be so construed as to defeat this right.

"I cannot agree with Mr. Williams [California Superintendent of Banks] that depositors would necessarily be led to assume that savings accounts received by national banks would be subject to investment according to State laws; and while national banks should not be permitted to advertise themselves as 'savings banks,' since they are not so designated in the act, power is specifically granted to member banks to receive interest-bearing accounts, including 'savings accounts' and since they possess this power the right to advertise for such accounts would seem to be a necessary incident to its exercise.

"It is not believed, therefore, that the penalties prescribed by Section 49 of the bank act of the State of California could be legally enforced against a national bank which advertises that it will receive and pay interest on savings accounts." (1 Fed. Res. Bull. 18, 20-21.)

This ruling of the Federal Reserve Board has been in effect since 1915 and has not been modified. In 1916, after its publication, Congress, in amending Section 24 of the Federal Reserve Act, re-enacted without change the pertinent language "may continue hereafter as heretofore to receive time deposits and to pay interest on the same" (39 Stat. 754). And, in 1927, as discussed above, Congress again re-enacted this identical language, but enlarged it by inserting the words "and savings" before "deposits" (44 Stat. 1232).

In these circumstances, the well-known rule of statutory construction—that, by the re-enactment without material change of a statutory provision which has been the subject of an administrative construction, Congress must be taken to have approved that construction and to have given it the force of law—would seem to be particularly applicable here. *Helvering v. Reynolds Co.*, 306 U.S. 110, 114-115, *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100. See *Labor Board v. Gullett Gin Co.*, 340 U.S. 361, 366.

In addition to the ruling of the Federal Reserve Board, the Comptroller of the Currency has expressly ruled on the precise issue involved in this case. On July 10, 1939, the Comptroller submitted a formal opinion to the Attorney General of New York holding, with detailed supporting reasoning, that national banks in New York were empowered to use the word "savings" notwithstanding the prohibition of its use contained in Section 258(1) of the New York Banking

Law.¹⁶ This opinion emphasized the paramount nature of any federal laws granting powers, including incidental powers, to national banks over any conflicting State laws or over any such laws which impair or frustrate the discharge of the functions of national banks. The opinion referred with approval to the 1915 Federal Reserve Board ruling discussed above and stated that the Congressional re-enactment of the pertinent language of Section 24 of the Federal Reserve Act constituted Congressional approval of the Board's administrative construction.

The opinion stated in part:

"Therefore, with the right of national banks to accept savings deposits clearly established under powers expressly granted by Congress, it is believed, in conformity with the cases cited above, that any State law which interferes with a national bank in the maintenance of a department in which such deposits are accepted under the title of "Savings Department", or from freely advertising the fact that national banks have the right to accept such savings deposits, is an attempted exercise of authority which expressly conflicts with the laws of the United States and impairs the efficiency

¹⁶ A certified copy of the original opinion of the Comptroller of the Currency dated July 10, 1939, and labelled "Defendant's Exhibit 00 for Identification" is included with the original documents in this cause lodged by the New York Court with the Clerk of this Court. This opinion was reprinted in Appellant's Statement as to Jurisdiction, pages 54-60.

of agencies of the Federal Government to discharge the duties for which they were created."

After pointing out that Section 258(1) of the New York Banking Law forbids a national bank even to publish the exact language of the federal law authorizing the receipt of "savings" deposits, the opinion concluded:

"Certainly it cannot be contended either that national banks do not have the right to solicit time or savings deposits which they have the express right, under Federal law, to accept, and upon which their existence depends * * * or that national banks do not have the right to publish *verbatim* sections of Federal law under which they operate.

"Therefore, * * * section 258 of the Banking Laws of the State of New York, quoted herein, is of no application to national banks."

The Court of Appeals disregarded the administrative interpretation of Section 24 of the Federal Reserve Act by the Federal Reserve Board and by the Comptroller of the Currency. Yet, in a situation like the present where there is no statutory indication that these rulings are incorrect and where they have been consistently adhered to and followed for a long period of time, they are "entitled to great respect and should ordinarily control the construction of the statute by the courts." *Pennoyer v. McConnaughy*, 140 U.S. 1,

23. See particularly *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524; *Berger v. Chase National Bank*, 105 F. 2d 1001, affirmed without opinion, 309 U.S. 632.

D. The State Statute is in Direct Conflict With the Federal Statutes and Must Yield.

Section 258(1) of the New York Banking Law expressly prohibits a national bank from using the words "saving" or "savings" (1) in its banking or financial business, or (2) in any advertisement relating to that business. The federal statutes, as we have shown, authorize the prohibited use. A conflict exists, direct and positive. In such circumstances, the supremacy clause of the Constitution, Article VI, Clause 2, requires that the state law must yield. As was stated in *Florida v. Mellon*, 273 U.S. 12, 17:

" * * * Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield.

* * * *

"Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results * * *." ¹⁷

¹⁷ The fact that the conflict is between an express State statute, on the one hand, and an implied provision of a federal statute, on the other hand, is not material. The State law must yield. *Hines v. Davidowitz*, 312 U.S. 52; *First National Bank v. California*, 262 U.S. 366; *Easton v. Iowa*, 188 U.S. 220; *Davis v. Elmira Savings Bank*, 161 U.S. 275; *Farmers & Mechanics National Bank v. Dear-*

This Court has frequently been required to protect the national banking system from infringement by State laws in conflict with the pertinent federal statutes. The leading case, we believe, is *Easton v. Iowa*, 188 U.S. 220. That case is singularly apposite to the instant controversy, not only because this Court was called upon to resolve a conflict between the State and federal banking laws by upholding the supremacy of the latter, but also because the State of Iowa sought unsuccessfully to uphold its own statute on grounds strikingly similar to those relied on by the State of New York here.

In the *Easton* case the Supreme Court of the State of Iowa had affirmed the conviction of the president of a national bank for violating a State statute making the receipt by a bank of deposits while insolvent and when such insolvency was known to the defendant a criminal act. On the other hand, the National Bank Act required a national bank to continue its operations until the Comptroller of the Currency deemed it insolvent and appointed a receiver to wind up its affairs. The Comptroller had taken no action.

In upholding the application of its own statute to national banks in the *Easton* case, 113 Iowa 516, 85 N.W. 795, the Iowa Supreme Court based its decision on an earlier case in which it characterized its law

ing, 91 U.S. 29; *Fidelity National Bank & Trust Co. v. Enright*, 264 Fed. 236; *Springfield Inst. for Savings v. Worcester F. S. & L. Ass'n*, 329 Mass. 124, 107 N. E. 2d 315, *certiorari denied*, 344 U.S. 884.

as "a police regulation having for its object the protection of the public from the fraudulent acts of bank officers." *Iowa v. Fields*, 98 Iowa 748, 751, 62 N.W. 653. (Compare the references in the opinion of the Court of Appeals in the instant case to the purpose of Section 258(1) of the New York Banking Law to prevent "fraud" and "deception.") Moreover, the Iowa Court stated:

"Surely, it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons." (*Ibid.*)

This language found an almost exact parallel in the opinion of the Court of Appeals herein which stated:

"Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage" (R..688).

This Court rejected the grounds relied on by the Iowa Supreme Court, pointing out that the National Bank Act—

" * * * has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." (188 U.S. 220, 229)

And, after emphasizing the role of national banks in aiding the government in the public service, the opinion continued—

“Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislatures* * *.” (*Id.* at 230)

The Iowa Court, in an effort to show that there was no direct conflict with federal law, had pointed out that no law of Congress prohibited the receipt of deposits by an insolvent bank, a contention similar to the position taken by the Court of Appeals herein that no act of Congress in terms authorizes national banks to use the word “savings” in their advertising. But this Court found that Congress had provided a symmetrical and complete scheme for national banks and had not intended to leave the field open for the various States to attempt to promote the welfare and stability of national banks by direct legislation. (*Id.* at 231.)

In reversing the conviction and holding the Iowa statute invalid as applied to national banks, this Court said:

“Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the *sole power to regulate and control the exercise of their operations*; * * * *that it is not competent for state legislatures to interfere, whether*

with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." (*Id.* at 238; emphasis supplied.)

Another case almost identical with the instant case is *Fidelity National Bank & Trust Co. v. Enright*, 264 Fed. 236. In that case the State of Missouri contended that the bank could not combine the use of the words "bank" and "trust company" in its title since a State law provided that only a State-licensed trust company could use the word "trust" in its title. The national bank, whose name had been approved by the Comptroller of the Currency, had formerly been a State-licensed trust company. The State Bank Commissioner argued that it could use one title or the other but not both. He also claimed that it was illegal for the national bank to *advertise in any manner to the public* that it was engaged in the exercise of trust powers vested in it pursuant to an act of Congress. The District Court heard the case upon an action to enjoin the State from refusing to approve the national bank as a depository for the funds of State banks and trust companies, and, in granting the injunction, said:

" * * It surely cannot be contended that if valid authority is granted to a national banking corporation to exercise certain functions, *under a name which no state agency is entitled to question*, the enjoyment of the legitimate powers thus conferred can be indirectly limited or destroyed in the man-

ner alleged in this bill. That such would be the necessary effect of the action of the bank commissioner cannot be doubted." (*Fidelity National Bank & Trust Co. v. Enright*, *supra*, 239-240; emphasis supplied.)

This case has been cited with approval by this Court on a related issue. *Burnes National Bank v. Duncan*, 265 U.S. 17, 24-25.

In *First National Bank v. California*, 262 U.S. 366, a State law relating to dormant accounts in national banks was held invalid, although there was no express federal statute on the subject. The pertinency of the following language of this Court's opinion to the case at bar is obvious:

"Plainly, no state may prohibit national banks from accepting deposits or directly impair their efficiency in that regard.

* * * * *

"* * * If California may thus interfere other states may do likewise * * *. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile * * *." (*Id.* at 369-370)

This Court, in sustaining the application of an escheat statute of Kentucky to deposits in national banks,

carefully distinguished the case of *First National Bank v. California*, *supra*, in language consistent with that quoted from that decision in the text. *Anderson National Bank v. Lockett*, 321 U.S. 233, 249-252.

Before the Court of Appeals, the State relied upon the well-known decisions in the field of inter-governmental tax immunity and drew comfort from the fact that the principle that neither the State nor the Federal Government can tax the "instrumentalities" of the other—a principle which at one time had been vigorously adhered to—has been liberalized in recent years. See, *e.g.*, *James v. Dravo Contracting Co.*, 302 U.S. 134; *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342; *Graves v. New York ex. rel. O'Keefe*, 306 U.S. 466; *Helvering v. Gerhardt*, 304 U.S. 405.

In all these cases, the immunity from the tax in question was claimed by a private person merely on the basis that he bore some contractual relationship to the Government, *i.e.*, employee, lessee or contractor. There is, of course, no reasonable basis to question a retreat from the strict application of a concept of tax immunity, derived solely from the implications of the Constitution, to the present position of this Court that such private persons, to whom Congress has not seen fit to grant tax immunity, should not escape general and nondiscriminatory tax burdens borne by other citizens. (See *Oklahoma Tax Commission v. Texas Co.*, *supra*, decided by a unanimous court in 1949.) The very statement of these underlying reasons for the present position of this Court on this issue shows, however, how

inapposite this line of cases is to any issue at bar. The status of a national bank, chartered by the United States and strictly controlled and regulated by it, bears no relationship to the status of a private person who happens to have a contract with the United States Government. See *Alabama v. King & Boozer*, 314 U.S. 1.¹⁸ Moreover, as we have shown, Congress in the instant situation has authorized national banks to take a course of action which directly conflicts with the sanctions imposed by the New York law.

The State's reliance below on *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, is likewise misplaced. This case is closely akin to the tax cases discussed above. It simply holds that a valid State minimum milk price regulation does not become invalid when it is applied to a private milk dealer who held a contract to sell his products to the United States Government. There was no interference with the Government and no burden placed upon it, except in so far as State regulation might increase the price to all purchasers, including the Government. And this, in the absence of any immunity granted by Congress, was permissible. *Id.* at 269-270. There is, of course, no reasonable basis for identifying the milk dealer in that case with the national bank involved here; furthermore,

¹⁸ Even now, it is clear that, without Congressional consent, the States cannot tax the Federal Government or its agencies, while the Federal Government is empowered to tax certain activities of the States. Compare *Mayo v. United States*, 319 U.S. 441 (discussed *infra*, pages 59-60) with *New York v. United States*, 326 U.S. 572.

Congress has not remained silent but has acted in a manner which leaves no room for the operation of the State law.

It is thus apparent that Section 258(1) of the New York Banking Law, in so far as it prohibits national banks from using the words "saving" or "savings," is in direct conflict with the paramount federal law. The State law must accordingly yield.¹⁹

E. The State Is Not Empowered to Impose its Own Banking Standards on National Banks. Moreover, the Use of the Word "Savings" by National Banks Is Not Deceptive or Misleading.

The State contends that the rationale of the cases cited above does not apply to its law because, as the Court of Appeals held, "Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage" (R. 688). The validity of this statement hinges, of course, on the meaning of the term "deceptive verbiage." The Court of Appeals could not have meant active or intentional deception of the public since, as shown *supra*, pages 27-32, there was no evidence of such conduct on the part of the Bank and the Court of Appeals, in complete agreement with the Trial Court, had absolved it of the charges of this

¹⁹ The well recognized banking authority, Paton's Digest of Legal Opinions, agrees with this conclusion. It is there stated:

"It seems to be beyond dispute that (1) national banks can receive savings deposits and (2) can advertise this service."
(I Paton's Digest, 1940 edition, 645; see also *id.* at 553.)

nature brought by the Attorney General. Accordingly, the Court of Appeals uses "deceptive" (and words of like meaning) in the sense that the prohibited words are *ipso facto* misleading. See *supra*, pages 31-32. But it is clear that, while Congress did not intend to authorize national banks to engage in false and misleading advertising of any nature, it likewise did not intend to subject national banks' advertising to scrutiny by the State Bank Commissioners of forty-eight states, each acting under its own State laws which might or might not define some banking term as misleading. Furthermore, no claim can or has been made that, apart from the gloss the State claims the word has received in New York, the use of the word "savings" by national banks is inherently deceptive. It is an appropriate word of ordinary meaning which accurately and meaningfully defines an authorized function of national banks—that of receiving "savings deposits."

The case of *Mayo v. United States*, 319 U.S. 441, is particularly pertinent. This case involved an attempt by the State of Florida to tax and regulate the distribution of fertilizer in that State by the United States pursuant to the Soil Conservation and Domestic Allotment Act. The State argued that the United States was not exempt by Constitution or statute from compliance with reasonable state regulation or the payment of reasonable inspection fees and that regulation and inspection were necessary to protect the farmers against the fraudulent imposition of fertilizers of inferior quality

(319 U.S. 441, 444, 445). This Court considered this contention, saying:

“* * * Admittedly the state inspection service is *to protect consumers from fraud* but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction.” (*Id.* at 447-448; emphasis supplied.)

This reasoning applies with particular force to the instant case. Here, of course, as developed above, Congress has not remained silent. Furthermore, national banks are subject to comprehensive regulation, examination and control by the Comptroller of the Currency. If national banks are also subject to inconsistent state regulation, even regulations designed to protect its citizens against fraud and deception, chaos in the administration of the banking laws would be the inevitable result. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218. It cannot be assumed that the Comptroller of the Currency would permit national banks under his supervision to engage in deceptive practices. In this case, moreover, he has ruled affirmatively that a course of conduct identical with that carried on by the Bank is authorized under national banking laws, *supra*, pages 47-49, a ruling

which reflects his opinion that the use by the Bank of the word "savings" is not deceptive.²⁰

In the light of the carefully prescribed administration of the national banking system which Congress has lodged in the Comptroller of the Currency, it is not competent for the State to interfere, "whether with hostile or friendly intentions." *Easton v. Iowa*, 188 U.S. 220, 238. Accordingly, it is not permitted to the State of New York to impose on national banks its own standards of banking or its own concepts of the proper or appropriate means by which national banks can attract the public to their doors. The Court of Appeals, however, erroneously concluded that, since the New York State Legislature in enacting the challenged legislation had determined that the use of the prohibited words was deceptive and misleading, Congress could not have intended that national banks should use them in carrying on their banking operations. The Court thus made the determination of Congressional intent a matter turning upon the motives of the State Legislature. In so doing, the Court of Appeals closely followed the reasoning of the Supreme Court of Iowa which this Court expressly rejected in *Easton v. Iowa*, *supra*, at 229. See *First National Bank v. Fellows*, 244 U.S. 416.

²⁰ The 1939 opinion of the Comptroller of the Currency refers to various opinions of the Attorney General of the State of New York and finds them in error. Appellant's Statement as to Jurisdiction, page 54 at pages 55-56. These opinions of the Attorney General, in holding the New York law applicable to national banks, had emphasized the purpose of the State law to prevent deception.

Since the motives of the State Legislature are not material to the determination of the instant case, the Bank, of course, rests its position on the supremacy clause of the Constitution, Article VI, Clause 2, as applied in many decisions of this Court to protect national banks from legislative interference by the States. In other words, the Bank's position is unsailable even assuming, *arguendo*, that full weight is given to the contentions of the State that the purpose served by the challenged New York law is the prevention of deception and misleading advertising. Although the Bank could stop at this point, it seems most appropriate, in view of the allegations of fraud and deception (although they are conceded not to have been intentional acts) which permeate the State's case, to examine the soundness of its basic premise that the law does serve the avowed purposes.

In so doing, the Bank is not attempting in any way to derogate from the proper functions to be served by the Court of Appeals, the court of last resort of the State of New York, in cases such as this in which a State law is challenged before this Court. The Bank, while attacking the validity of Section 258(1) of the New York Banking Law as applied to national banks, does not challenge the *construction* of the language of that law by the New York Court of Appeals. In fact, there is no controversy over the proper interpretation of the language of that Section. In terms which are clear and unequivocal, the New York Legislature has prohibited the use of the term "savings" by other than

the favored banks specified, and in like definite terms has included national banks within the prohibition of the statute, as the Court of Appeals held. Nor does the Bank challenge the right of the State of New York to apply to the banking instrumentalities of its own creation the standards of advertising that find their legislative expression in Section 258(1). See *Davis v. Elmira Savings Bank*, 161 U.S. 275. However, when the State of New York attempts to apply the State-created standards to national banks, a national bank, like the Appellant here, is entitled to address considerations to this Court which show that the purposes claimed for the statute are not served, but quite other and detrimental consequences follow the application of the statute.

In *Easton v. Iowa*, *supra*, this Court invalidated the Iowa law as applied to national banks on the basis of the supremacy doctrine, but the Court was not content to let the matter rest there in view of the serious accusation of fraudulent conduct denounced by the State statute of which Easton, president of a national bank, had been found guilty. This Court convincingly demonstrated that the particular conduct made a criminal act by the Iowa law (receiving deposits with knowledge of the bank's insolvency) was not fraudulent under the carefully planned system for the handling of distressed banks established by the National Bank Act but, on the contrary, that a strict application of the Iowa standards to the national banks might be ruinous to the bank's depositors. *Id.* at 232. Similarly, in this case an examination of the New York

statute shows, when applied to national banks, that it fails to meet the objectives claimed of it by the State.

The New York law has a long history, going back to 1858, but its present drastic form dates back only to 1905, about eighty-five years after mutual savings banks were first organized in New York.²¹ The New York Legislature, in first enacting the law as Chapter 132 of the Laws of 1858, made it unlawful for any bank, etc., "established in any city or village where a chartered savings bank is located and transacting business, to advertise or put forth a sign as a savings bank, * * *." By 1875 the law had been amended to prohibit any bank, etc. "to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank; * * *." L. 1875, Ch. 371, Sec. 49. It is pertinent to observe that this language was designed to prevent only the simulation of a savings bank, a charge upon which the Bank here was expressly cleared (*supra*, pp. 29-30).²²

²¹ Francis J. Ludemann, Deputy Superintendent of Banks, testified that the history of savings banks began in 1819 (R. 284).

²² The New York law was in the form last quoted in the text (an amendment by L. 1882, Ch. 409, Sec. 283 not having changed this language) when the Court of Appeals decided *People v. Binghampton Trust Co.*, 139 N. Y. 185, 34 N. E. 898, in 1893. The case held that a trust company had not violated the Act since it had not simulated a savings bank. In so holding, the opinion of the Court of Appeals contained this interesting observation:

"Can there be such a thing as an exclusive appropriation of a system of conducting commercial transactions, and thereby to symbolize it to the world? I do not think that savings banks, however closely in the public interest they should be guarded, should be accorded a monopoly of any set of business rules." (*Id.* at 190.)

It was not until 1905 (after two immaterial amendments in 1892 and 1904) that the Act was substantially amended to prohibit any use of the word "savings" in the banking business and to extend the protection of the statute to a "building and loan association organized under the laws of the state of New York." L. 1905, Ch. 564. That banks other than mutual savings banks could use the term "savings" prior to 1905 clearly appears from the language of the Appellate Division in this case:

"For almost half a century the only banks permitted to use the word 'savings' in the State of New York have been mutual savings banks (Laws of 1905, Chap. 564)" (R. 679).

Thus, it is interesting to note that, during the 19th century when the banking system of the nation was gradually being evolved and when unsound banking practices were rife and economic recessions and bank failures followed a common cyclical pattern, the State of New York did not find it necessary to protect depositors in mutual savings banks from any except the active fraudulent act of simulating a savings bank. It was not until the early years of this century that New York enacted a flat prohibition against the use of the word "savings" in the business of any bank other than New York mutual savings banks and building (later savings) and loan associations.

In 1914 the law was substantially amended to include national banks within its prohibition, as follows:

"No bank, *national banking association*, trust company, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or its *equivalent*, in its banking business, or advertise or put forth any advertising literature or sign containing the word 'saving' or 'savings,' or its equivalent, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank." (L. 1914, Ch. 369, Sec. 279; emphasis supplied.)

It is to be noted that by the 1914 amendments the law prohibited the use not only of the word "saving" or "savings" but also its "equivalent," and the protection of the law was extended to savings and loan associations without reference to the law under which they were organized. Hence, federal savings and loan associations are included within the protection of the New York law thereby creating the anomalous situation of a State law discriminating between two different classes of federal financial instrumentalities—national banks and federal savings and loan associations.

The only significant amendments to the New York law since 1914 have been those enacted in order to bring other types of financial institutions within the protection of the law. In 1932 the use of the word "savings" was permitted in the name of the "Savings and Loan Bank of the State of New York" and in 1934 the statute was further amended to permit the use of the

word "savings" in the name of a trust company all the stock of which is owned by not less than twenty savings banks.²³ (L. 1932, Ch. 604; L. 1934, Ch. 255.)

In 1941 the New York law, which had previously been re-numbered as Section 258 of The Banking Law (L. 1938, Ch. 352, Sec. 258), was amended to extend the prohibition of the use of the word "saving" or "savings" not only to the "banking" but also to the "financial" business of the banks to which the prohibition applied. (L. 1941, Ch. 585.) As so amended, it has remained unchanged to date.

It thus appears that the exclusive purpose of this New York statute, until it was amended in 1905, as discussed above, was to prohibit any institution or person, except the specified banks, from simulating, or holding out to be, a savings bank. See *People v. Binghamton Trust Co.*, 139 N.Y. 185, 34 N.E. 898. And even after 1905 this remained a principal purpose of the law.²⁴ Yet the Court of Appeals completely exonerated the Bank from the charge that it had simulated a savings bank by "soliciting or receiving deposits as a savings bank" (R. 685). It is therefore difficult to understand how the Bank could possibly have deceived any member of the public into

²³ There is one such institution in New York—The Savings Banks Trust Co. See McNally's Bankers Directory, 1953 ed., page 1091.

²⁴ This is confirmed by a 1907 opinion of the Attorney General of New York that national banks had no right to hold themselves out as savings banks or to advertise as such. 1907 Opinions of the Attorney General of New York, p. 473.

believing that it was a New York mutual savings bank when it neither solicited nor received deposits as a savings bank.

The Court of Appeals said nothing to explain away the dilemma in which the State finds itself; it did not explain how advertising for "savings" could be deceptive when there was no attempt by the Bank to advertise as a savings bank. Furthermore, the Court of Appeals did not indicate how the word "savings" could be inherently deceptive.²⁵ If we turn, however, to the opinion of the Appellate Division, we find the statement that over the course of time the prohibited word "savings" had become "so associated with the idea of 'savings bank' that if used by another kind of bank, some people were apt to be misled into thinking it to be a mutual savings bank" (R. 680). No basis in fact was advanced for this observation, and the record is barren of testimony which would support it.²⁶ Indeed, it is strange that only New York has found the

²⁵ It is also difficult to follow the reasoning of the Court of Appeals when it refers to the Congressional authorization of national banks to receive "savings deposits" as being merely "descriptive of a well-known type or kind of bank deposits" (R. 687) and yet, in the same opinion, refers to the use of the same expression by national banks as being "deceptive" and "misleading." If Congress described a well-known kind of deposits as "savings deposits," how, it may be asked, can that very description be deceptive and misleading? See dissenting opinion of Fuld, J. (R. 691).

²⁶ The State's witness, Arthur R. Seaton, State Bank Examiner, testified that he could not name one person in the entire State of New York who had been fooled or deceived by the Bank's use of the word "savings" (R. 69).

use of the word "savings" by national banks to be deceptive. Of the 17 States which have mutual savings banks, only New York, we understand, has in terms prohibited national banks from using the word "savings" or has attempted to apply any statutory control of the use of the word to national banks.

The New York law contains in its very language contradictions and inconsistencies which are not consonant with its avowed purpose to prevent the public from being "fooled" into believing that any use of the word "savings" must refer only to a mutual savings bank. The statute does not extend its protection solely to mutual savings banks, but since 1905 has protected other financial institutions competing with national banks. As presently in force, the New York statute permits the use of the word "savings" not only by mutual savings banks but also (a) by savings and loan associations, both federal and state, (b) in the title of the Savings and Loan Bank of New York and (c) in the title of any trust company the stock of which is owned by more than twenty savings banks.²⁷

Surely the identification of the word "savings" with mutual savings banks is completely lost if the word can be used by such diverse kinds of organizations as those now protected by the statute. The dilemma in which the State finds itself in trying to maintain the exclusive identifications of the term "savings" with mutual savings banks is demonstrated by the fact that there are only 130 such banks in New York while there are

²⁷ See footnote 23, *supra*, p. 67.

at least 185 savings and loan associations located in New York.²⁸

The effort of the State to identify the word "savings" with a particular type of institution must fail in respect to national banking associations authorized by the United States Government since Congress has clearly shown that, in relation to such banks, "savings" means a particular kind of an account, not an institution. Thus, when Congress in 1927 authorized national banks to receive and pay interest on savings deposits, it was obviously referring to a type of account or deposit. The same connotation obviously applies to the other references to "savings" in Section 24 of the Federal Reserve Act. Of particular significance is the authority which Congress has granted the Board of Governors of the Federal Reserve System to define "savings deposits" (38 Stat. 270, as amended, 12 U.S.C. § 461), and which the Board has exercised by the issuance of regulations. See *supra*, pp. 37-38. The definitions of "savings deposits" contained in these regulations, which apply to all other national banks, do not, of course, connote an institution but refer only to a type of deposit. It is only as thus defined and with such a meaning that the Bank has used the word "savings." Hence, the meaning which the State attempts to impute through legislative action to the word "savings" conflicts directly with the statutes

²⁸ Annual Report of the Federal Deposit Insurance Corporation, 1952, p. 52; 6th Annual Report House and Home Finance Agency, 1952, p. 199.

nacted by Congress and the regulations adopted thereunder.

It is curious that a law which assertedly is designed to prevent deception has forced the use of language which, if not actually misleading, prevents the public from obtaining a clear understanding of a particular function being performed by national banks in New York. It will be recalled that since 1914 the New York statute has prohibited not only the use of the word "saving" or "savings" but also their equivalent" (*supra*, p. 66). The practice has developed in New York, under the threat of this statute, of commercial banks calling their savings accounts "special interest accounts," "thrift accounts" and "compound interest accounts." All these terms, of course, are somewhat labored equivalents of the term "savings accounts."²⁹ The Court of Appeals in the instant case found these expressions are "synonymous" with "savings accounts" (R. 689). Yet the Court apparently failed to realize that if they are synonymous, they are necessarily equivalent to "savings accounts" and hence

²⁹ August B. Weller, President of the Meadowbrook National Bank, gave the following significant testimony:

"The words thrift, special interest, or compound interest, are absolutely futile in appealing to the public to indicate what the word savings [means], * * * and not only do not produce results, but they are in my opinion entirely misleading. I do not think they convey to the public, or even to those of us who work in banks, the sense of what they really mean. We are trying to indicate the meaning of the word, savings in a savings account, by using other terms which do not at all indicate what the account is." (R. 140.)

should come under the ban of the statute.³⁰ It hardly can be said that the statute prevents deception if its necessary effect is to force banks to label "savings accounts" with words of equivalent meaning but prevents the use of the word of common understanding that readily and accurately identifies the account in the public's mind. That the public is being misled by this circumlocution forced upon national banks in New York is revealed by the Hofstra Survey which shows that only a small percentage of the public knows the meaning of these substitute expressions while "savings" is well understood. See *infra*, pages 92-93.

There is another consideration which shows that the use of the word "savings" by national banks cannot be inherently deceptive. The Bank's advertisements for savings accounts or other use of the word "savings" of course, is under, or in conjunction with, its name—Franklin National Bank of Franklin Square. "National" has been an integral part of the corporate name of national banks for almost a century—since the National Bank Act was enacted in 1864. It can only be used in the name of national banks created by the United States Government (17 Stat. 603, re-enacted 62 Stat. 862, 18 U.S.C. 709). Accordingly, it cannot be assumed without proof that national banks and State mutual savings banks cannot be separated in the minds of the public in New York. The State offered

³⁰ Apparently the Attorney General has tolerated this apparent violation of the law although he has issued no opinion that the use of these substitute terms forced upon all except the privileged banks is consonant with the statute.

no proof and cannot possibly adduce any that there was any possibility that when a person entered the doors of the Franklin National Bank, filled out one of its "savings" deposit slips (Pl. Ex. 13A, R. 35, 578A) and made deposits at the "savings" counter (Pl. Ex. 21, R. 42, 588), he was under the delusion that he was depositing his savings in a mutual savings bank organized under the laws of the State of New York.

It clearly appears that the use by national banks of the word "savings" does not refer to or connote mutual savings banks and that such use is not deceptive nor calculated to fool the public. Furthermore, the conclusion is inescapable that the meaning sought to be imputed to the word "savings" by the State of New York is directly contrary to the meaning imputed to the term by Congressional enactments and administrative regulations adopted under Congressional authority. The meaning attributed to the term by Congress must, of course, prevail.

II.

SECTION 258(1) DISCRIMINATES AGAINST NATIONAL BANKS IN FAVOR OF STATE INSTITUTIONS AND HAMPERS AND IMPAIRS THE EFFICIENCY OF NATIONAL BANKS.

A. National Banks Are the Necessary Instruments of Effectuating the Nation's Monetary Policy.

The Federal Reserve System, as established by Congress in the original Federal Reserve Act of 1913 and its amendatory acts, has as its principal purpose the formation of the national monetary policy within the directives of that legislation and under the powers con-

ferred thereby. The Board of Governors of the Federal Reserve System in describing this function of the System has said:

“The principal purpose of the Federal Reserve is to regulate the supply, availability, and cost of money with a view to contributing to the maintenance of a high level of employment, stable values, and a rising standard of living.”³¹

One of the chief means chosen by Congress in the Federal Reserve legislation to carry out the nation's monetary policy was a reserve system of banking under which the nation's supply of money is principally controlled by a central agency (the Board of Governors of the Federal Reserve System) having power to specify the reserve requirements of *member banks*. Obviously, a material condition to the success of such a system is a sufficient number of member banks having sufficient deposits to make compliance with the Board's reserve requirements a controlling factor in determining the country's money supply. To insure this, Congress has required that its creatures, the national banks, be members of the Federal Reserve System and that other State banks and trust companies could become members upon meeting certain standards and complying with certain conditions. These other mem-

³¹ *The Federal Reserve System—Its Purposes and Functions* (Board of Governors of the Federal Reserve System, Washington, D. C., 1947) p. 1.

bers may, however, withdraw from the System. The national banks may not withdraw and still remain national banks. Since national banks are the only instruments that the Board may count on with any certainty as the means through which to carry out the nation's monetary policy, it is clear that they form the backbone of the Federal Reserve System.

Moreover, the national banks, both from the standpoint of numbers and volume of deposits, form the preponderant element of the System's membership of banks. Thus, as of September 30, 1953 (the last date for which reliable figures are available), there were 6,753 member banks in the Federal Reserve System holding total assets of \$158,227,614,000.³² Of this number, 4,863 were national banks holding assets of \$106,056,534,000. Of the remaining banks, the 1,890 State member banks of the System held total assets of \$52,171,080,000. The 6,753 member banks held a total of \$35,258,642,000 of time deposits. Of this amount, the national banks held \$24,130,977,000; the State member banks, \$11,127,665,000.³³ The total assets of the

³² All figures cited in this paragraph are obtained from Member Bank Call Report No. 129, issued by the Board of Governors of the Federal Reserve System, September 30, 1953, p. 3.

³³ The amount of savings accounts represented in these figures is about 90% of the total amount of time deposits. The last year in which a breakdown was made between savings deposits and other time deposits was 1945. In that year savings deposits in national banks amounted to \$13,631,451,000 as compared to total time deposits of \$14,623,029,000, or 93.2%. Annual Report of the Comptroller of the Currency, 1945, Tables 11 and 37.

member banks of \$158,227,614,000 constitute over 85% of all commercial bank assets in the United States.³⁴

The facts that (1) national banks comprise 72% of the member banks of the System, (2) their total assets comprise 67% of the total assets of the member banks and (3) the non-national bank members may withdraw from the System, make it clear beyond question that the national banks are the instruments upon which the Federal Reserve Board must in the last analysis depend to implement the nation's monetary policy entrusted to it by Congress. Anything that impairs the ability of national banks to survive as efficient and prosperous banks in the face of the competition that they meet from State financial institutions impairs in turn the efficiency of the Federal Reserve System to carry out the monetary policy of the nation. That Congress has been aware of this is demonstrated by the fact that it has in the Federal Reserve legislation made available to national banks powers which they need to survive in the face of competition from State financial institutions. Among such powers, in addition to the authority to receive savings deposits and to invest in long-term real estate mortgages, discussed under I,

³⁴ This percentage was obtained by comparing the ratio of the total assets of all commercial banks on June 30, 1953 (the last date for which accurate figures are available), of \$181,424,925,000 with the total assets of all member banks on June 30, 1953, of \$154,258,258,000. Board of Governors of the Federal Reserve System. All Commercial Banks in the United States and Possessions—Principal Assets and Liabilities, June 30, 1953, E.4(b); Member Bank Call Report No. 128, issued by the Board of Governors of the Federal Reserve System, June 30, 1953.

supra, were the power to engage in branch banking and the power to act as trustee.³⁵ It would indeed seem far-fetched to believe that Congress, in deliberately legislating to empower national banks to engage in certain activities that would permit them to operate as efficient members of the Federal Reserve System, intended that States might circumscribe any of those powers by legislation favoring State institutions.

B. Since Savings Deposits Are an Essential Element of a National Bank's Business, Any State Restrictions Affecting the Receipt and Handling of Savings Deposits Will Seriously Hamper National Banks.

The success of all commercial banks depends upon their ability to obtain loans, *i.e.*, deposits, from their depositors. *First National Bank v. California*, 262 U.S. 366, 370. This statement applies particularly to the time deposits, including the savings deposits, of national banks. By law, a national bank is allowed to make real estate mortgage loans (a profitable source of income to national banks) in an amount equal to the capital stock of such bank paid in and unimpaired plus the amount of its unimpaired surplus fund, or 60% of its time and savings deposits, *whichever is the*

³⁵ For a discussion of various powers granted to equalize competition with State banking enterprises, see *infra*, pp. 82-84. For the proposition that Congress deliberately made these powers available to national banks in order that they might be in a position to survive in the face of competition of State financial institutions having like powers, see: Report of the Comptroller of the Currency, 1926, pp. 2-3; *Banking Studies* (Board of Governors of the Federal Reserve System—1941) pp. 50-51; Kent, *Money and Banking* (1947) pp. 302-303; 67 Cong. Rec. 2173, 2839, 3246-47.

*greater.*³⁶ Since it almost invariably occurs that 60% of the amount of time and savings deposits far exceeds the capital stock and surplus of a national bank, the amount a national bank may lend on real estate loans is limited directly by the amount of its time and savings deposits. Therefore, any restriction upon a national bank which interferes with its ability to accept and handle savings accounts will in turn restrict the amount the bank may lend on real estate, a function expressly authorized by Congress. Furthermore, since the amount of real estate loans cannot exceed 60% of time and savings deposits, there will always be available a minimum of 40% of such deposits for the other operations of the bank. Therefore, any State restriction upon savings deposits will *pro-tanto* restrict the funds available for such other operations.³⁷

The importance of time and savings deposits to national banks is found chiefly in their lending operations. In addition to mortgage loans secured by real estate, national banks, of course, make commercial and personal loans. It is obvious that demand deposits alone could not support these lending operations, espe-

³⁶ Section 24 of the Federal Reserve Act, 38 Stat. 273, 44 Stat. 1232, as amended, 12 U.S.C. § 371.

³⁷ The Trial Court, in the instant case, found that the receipt of savings deposits was a very important part of the Bank's business and that the Bank could not function without such deposits (R. 668). It concluded that receiving such deposits was a necessary element in enabling the Bank to prosecute its banking business "and to render the service to the United States Government in maintaining its system of banking and to the public which Congress intended it should" (*ibid.*; see testimony of Arthur T. Roth, President of the Bank, R. 437, 438, 441-442).

cially in view of reserve requirements.³⁸ Furthermore, demand deposits alone would not support the present capital structure of commercial banks since the earnings from demand deposits would not be sufficient to permit a reasonable return on the capitalization. Profitability is one of the requirements for successful private banking and an important factor determining profitability is the relation of capital to deposits.³⁹

Thus, it becomes apparent that any State action interfering with the receipt of savings deposits by national banks would tend to impair their efficiency and their ability to compete effectively with State banking enterprises. In addition to the effect on savings deposits, such action on the part of the State may hamper or impair the efficiency of national banks in other ways. It is a well-known fact that most persons prefer to conduct all of their banking business with one institution. Indeed, this is one reason for the vigorous competition among banks for customers. A customer satisfied with one phase of a bank's operations almost inevitably patronizes the other services offered by the Bank. Thus, a person opening a savings account with a financial institution becomes a potential, or an ac-

³⁸ The Federal Reserve Board's present reserve requirements are 6% of time deposits and varying percentages of demand deposits, depending upon the bank's location, ranging from 13% to 22% (40 Fed. Res. Bull. 39).

³⁹ William E. Dunkman, *A Study of Savings and Savings Facilities in New York State, 1941 and 1950*, prepared for The Branch Policy Committee, New York State Bankers Association, p. 114.

tual, customer for the other banking services offered by the institution. He may rent a safe deposit box, open a checking account, finance the purchase of his home or car, borrow on his personal note, handle his commercial loans with the institution, or, if available, utilize the facilities of its trust department. All these services increase the business of the bank and, in most cases, money loaned to a borrower is given by means of a credit to his account from which he draws over a period of time. Therefore, it may readily be seen that a potential customer of the Bank who wishes to open a "savings account" and does not know that national banks accept this kind of account, or one who refuses to place his money other than in a "savings account" (see discussion, *infra*, pages 89-90, 92-93), represents a loss to a national bank, not only of this deposit alone, but also of the potential business that the customer might have brought to the bank.

C. Section 258(1) Discriminates Against National Banks and Impairs Their Ability to Compete with State Financial Institutions.

It can hardly be denied that State mutual savings banks and State and federal savings and loan institutions are in severe competition with national banks (and other commercial banks) for savings deposits and that the competition is becoming increasingly intense (R. 155, 411). This competition also extends to the interest rates paid on savings accounts and to mortgage loans on real estate (R. 137, 161-164, 472-473). The proof in this record of competition is convincing.

e testimony was not contradicted that competition between national banks and other financial institutions in Nassau County, which is adjacent to New York City and in which the Bank is located, was "keen" and becoming keener all the time" (R. 155, 409-410). There was further uncontradicted proof that savings banks located in New York City and savings and loan associations located both in New York City and in Nassau County aggressively solicited savings deposits in the County and that savings and loan associations as far away as California also solicited savings accounts in the County (R. 410, 658, Def. Ex. EE, R. 411, 642-642D).

William H. Green, Vice President of the Bank, testified that advertising for savings deposits, as well as for mortgage loans, was engaged in by all types of financial institutions using all available media, including newspapers, direct mail, radio, television, billboards and even umbrellas on rainy days (R. 409). Mr. Green identified certain newspaper advertisements which clearly illustrated the extensive and persistent use of the word "savings" by mutual savings banks and by savings and loan associations (R. 410, Def. Ex. EE, R. 411, 642-642D).⁴⁰

⁴⁰ The existence of this competition was recently confirmed by the Report of the Finance Committee of the Senate made in connection with Section 313 of the Revenue Act of 1951, which amended the Internal Revenue Code to subject savings banks and savings and loan associations to income taxation. The Senate Committee reported:

"At the present time, mutual savings banks are in active competition with commercial banks and life insurance com-

It is clear that the State, by prohibiting national banks from using the word "savings" while at the same time permitting mutual savings banks and savings and loan associations to do so, has discriminated against national banks and placed them at a competitive disadvantage with respect to institutions which enjoy the protection of Section 258(1). (See R. 140-142, 156-157.)

The elimination of discrimination against national banks has long been the special concern of Congress which through many enactments has expressed its policy to place these banks in a position to compete successfully, not only with State commercial banks, but also with any bank, corporation or individual competing with some phase of the business of national banks. This Congressional policy was embodied in the original National Bank Act and in many amendments thereto and in the Federal Reserve Act and its amendments. A number of these amendments to the federal banking laws have been enacted to liberalize the restrictions upon, and to enlarge the powers of, national banks in order to equalize the competitive position of

panies for the public savings, and they compete with many types of taxable institutions in the security and real estate markets. As a result your committee believes that the continuance of the tax-free treatment now accorded mutual savings banks would be discriminatory." (Sen. Rep. No. 781, 82nd Cong., 1st Sess., p. 25.)

See also the statement regarding savings and loan associations made by the Committee. *Id.* at p. 28.

national banks and State banks operating under generally more favorable State laws.

In the National Bank Act, Congress provided that national banks could charge interest at the rates allowed by State law, except where a different rate was specified for banks organized under State law, that rate would be allowed to national banks⁴¹ (13 Stat. 108, R.S. § 5197, 12 U.S.C. § 85). Congress has further provided for competitive equality by authorizing national banks, with the permission of the Board of Governors of the Federal Reserve System, to exercise fiduciary powers if permitted by State law to competing State banks, trust companies or other corporations (40 Stat. 968, 12 U.S.C. § 248(k)). In furtherance of the same purpose, national banks may establish branches in those States where State banks are permitted by State law to operate branches (44 Stat. 1228, 12 U.S.C. § 36). In 1930, Congress relaxed the prohibition against the pledge of assets by national banks to allow them to provide security for the deposit of public moneys if State law authorized State banking institutions to give such security (46 Stat. 809, as amended, 64 Stat. 463, 12 U.S.C. § 90). In the field of taxation, Congress has permitted certain State taxation of national

⁴¹ A more recent indication of Congressional intent to equalize competition between national banks and State banks with regard to interest may be found in the provision in Section 24 of the Federal Reserve Act that national banks may pay interest on time and savings deposits equal, but not in excess of, the maximum rate authorized by law to be paid by State banks (38 Stat. 273, 44 Stat. 1232, as amended, 12 U.S.C. § 371, discussed *supra*, pp. 38-44).

banks from the time of the original National Bank Act, but has specified that the rate should be no higher than usually imposed by the taxing State on other financial corporations. And in the case of the taxation of the shares of stock of national banks, Congress has provided that the tax must not be assessed at a greater rate than that upon other moneyed capital. (R.S. § 5219, 42 Stat. 1499, as amended, 12 U.S.C. § 548.)

This Court has consistently recognized and supported the well understood purpose of Congress, reflected in the National Bank Act, the Federal Reserve Act and their amendments, to clothe national banks with the necessary powers to meet State banks and other State banking or financial institutions on a plane of competitive equality. As this Court stated in *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 412:

“ * * * It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition.”

Similar expressions of this Court and other courts of this principle are found in *First National Bank v. Fellows*, 244 U.S. 416, 425; *First National Bank v. Hartford*, 273 U.S. 548, 557; *Mount Pleasant National Bank v. Duncan*, Fed. Cas. No. 4804; *Downey v.*

Bankers, 106 F. 2d 69, *affirmed*, 309 U.S. 590; *F.D.I.C. v. Tremain*, 133 F. 2d 827; *Boatmen's National Bank v. St. Louis v. Hughes*, 385 Ill. 431, 53 N.E. 2d 403; *Wushton ex rel. Commissioner of Banking v. Michigan National Bank*, 298 Mich. 417, 299 N.W. 129.

The State, before the Court of Appeals, met the presentation of these Congressional acts and the decisions of this Court upholding them with the rather remarkable assertion that all that was revealed was a Congressional policy to subordinate national banks to State law and to require them to conform to State standards. But the exact contrary is revealed. Far from indicating an intent on the part of Congress to limit the powers of national banks, the acts and amendments we have discussed show an intent to liberalize particular restrictive laws governing national banks to enable them to compete more effectively with State banks, including savings banks and any other institution or individual carrying on a business in competition with them. See *Burnes National Bank v. Duncan*, 265 U.S. 17.

The State, of course, has asserted that it in no way attempts to interfere with the receipt of savings deposits by national banks, and the Court of Appeals disclaims any desire on the part of the State to claim a monopoly for the privileged institutions of what it terms " 'savings' type deposits" (R. 688). Yet, when the State prohibits the competing institutions from using an effective means of soliciting this type of deposits, the inevitable effect of the enforcement of Sec-

tion 258(1) is to arm its own institutions with a potent competitive device which can be employed in a manner tending toward monopoly. This the State cannot do. It cannot, under a claim that it is protecting its own citizens, deprive national banks of their right to compete openly with other institutions, State and federal, for the savings of the individual. See *Burnes National Bank v. Duncan*, 265 U. S. 17, in which Mr. Justice Holmes, in discussing an attempt by the State of Missouri to keep all trust powers in the hands of State trust companies, although national banks had been authorized to exercise trust powers in States in which competing institutions held such powers, said:

“The fact that Missouri has regulations to secure the safety of trust funds in the hands of its trust companies does not affect the case. The power given by the act of Congress purports to be general and independent of that circumstance and the act provides its own safeguards. The authority of Congress is equally independent, as otherwise the State could make it nugatory.” (*Id.* at 24.)

The Court of Appeals did not answer the Bank's contentions regarding the discriminatory nature of the State statute, but merely pointed out that there are differences between commercial banks and mutual savings banks and that savings and loan associations are entitled to the same protection as mutual savings banks (R. 688, 689-690). The Appellate Division, however, expressly stated that the State law was not discriminatory because the statute applied to all commercial

banks, both State and national, and that savings banks which operate under different conditions constitute a separate class entitled to different legislative treatment (R. 682).

The question is not whether a savings bank or a savings and loan association is a different type of institution from a national bank. The significant fact is that, in an important phase of their respective operations, *viz.* the obtaining and investment of savings deposits, savings banks and savings and loan associations are in direct competition with national banks. It is clear that, in the operation of their savings departments, which they are duly authorized by Congress to maintain, national banks are entitled to the same classification as mutual savings banks and savings and loan associations. Indeed, so far as the receipt and investment of savings deposits are concerned,⁴² there is no basis whatsoever for any valid distinction—a fact expressly recognized by Congress as late as 1951. (See Sen. Rep. No.

⁴² There is no difference in the relationship which exists, on the one hand, between a savings depositor and a mutual savings bank and, on the other hand, between a savings depositor and a national bank. The depositor in both cases is a creditor having no proprietary interest in the enterprise (R. 664). Persons depositing savings with savings and loan associations bear a somewhat different relationship to the institution. A savings and loan association does not receive deposits; it merely sells shares. And its capital consists of what would be savings accounts in other institutions, the holders of which are not creditors but only shareholders. Such shareholders have a right to vote on corporate matters but do not have an absolute right of payment as do depositors in mutual savings and commercial banks. See Rules and Regulations for the Federal and Savings and Loan Association, 24 C.F.R. §§ 141-148.

It is interesting to note that New York mutual savings banks hold a small amount of demand deposits. Report No. 38, Dec. 31, 1952, Federal Deposit Insurance Corporation, p. 63.

781, 82nd Cong., 1st Sess., pp. 25, 28, quoted in footnote 40, *supra*, pp. 81-82.)

A similar point was recognized in *First National Bank v. Hartford*, 273 U. S. 548. This Court, speaking of the Congressional legislation aimed at the discriminatory taxation of national banks (42 Stat. 1499, 12 U. S. C. § 548), held that it was designed "to prevent the fostering of unequal competition with the business of national banks * * * by institutions or individuals engaged either in similar businesses *or in particular operations or investments like those of national banks*" (*Id.* at 558; emphasis supplied). The Court emphasized that the important fact was not the character of the competing business unit but the nature of the competing operations (*Id.* at 557).

It, accordingly, is clear that national banks are in competition with State mutual savings banks and all savings and loan associations and that the State has weighted that competition in favor of the State protected institutions by granting them a competitive advantage which it denies to national banks. This is discrimination against national banks which is contrary to the long maintained policy of Congress as upheld by this Court. The New York law, therefore, is invalid as applied to national banks.

D. Section 258(1) Unduly Interferes With the Operations and Impairs the Efficiency of National Banks.

The Court of Appeals recognized that State laws which substantially impair the operations of national banks are invalid (R. 686-687). It concluded, however,

that the New York law does not impede national banks in carrying out their lawful operations (R. 686-689). That the court's conclusion in this regard was erroneous will now be shown.

We have discussed the great importance of savings deposits to national banks, *supra*, pages 77-80, and have developed that these banks would not be able without savings accounts properly to carry on their banking operations and discharge their functions as national banks. We have shown how severe is the competition between national banks and other institutions for savings deposits and how aggressively mutual savings banks and savings and loan associations in New York City and the adjacent County of Nassau advertise for such deposits by emphasizing the word "savings." It is with respect to this competition that the denial of the use of the word "savings" severely handicaps national banks and compels them to use substitute expressions which are not understood by, but only serve to confuse, the public. The result is a loss of existing or potential accounts and a severe interference with the banks' operations.

These substitute expressions—"thrift account," "special interest account" and "compound interest account"—forced on national banks by the prohibition contained in Section 258(1) were the subject of much consideration at the trial of this case. There was testimony that they had little appeal to the public; that customers withdrew money from national banks to deposit in savings banks because they did not know that the former handled "savings" accounts and that for the

same reason a substantial amount of business, necessarily immeasurable, was not given to national banks (R. 110, 142, 152, 158). Several presidents of national banks with long experience as banking officers testified that their banks were directly and substantially hampered by their inability to use the word "savings" and that the effect of this handicap was reduced earnings (R. 104, 110, 149). The testimony was that the use of the substitute expressions in appealing to the public for savings was futile and that the use of the word "savings" attracts more depositors than use of substitute expressions⁴³ (R. 140, 142).

Apparently recognizing the ineffectiveness of the substitute expressions in attracting depositors, the

⁴³ The New York Superintendent of Banks, in rather curious fashion, confirmed the testimony of these national bank officers that their inability to use "savings" in appealing to the public for deposits places national banks at a competitive disadvantage. When the Appellate Division ordered that the Bank be enjoined under Section 258(1) from using the word "savings," the Superintendent of Banks filed an affidavit in opposition to the Bank's motion for a limited stay of the injunction pending appeal to the Court of Appeals. One of the principal grounds for the opposition was that, if the Bank were not enjoined, its continued use of the word "savings" would give it an "unfair" and "competitive" advantage over other competing national and State commercial banks and that, to avoid the "*resulting competitive disadvantage*," other banks might be induced to violate the law. (Emphasis supplied.) Thus, the Superintendent of Banks, perhaps unwittingly, repeated the very reasons the Bank has advanced to show that the State law discriminates against it and interferes with its operations. (This affidavit of the Superintendent of Banks, dated February 20, 1953, was not printed as a part of the Record; it was, however, transmitted by the New York court in this case to the Clerk of this Court.)

State before the Trial Court (R. 489-490) and the Court of Appeals made the rather astonishing suggestion that national banks should attempt, through an extensive (and necessarily expensive) advertising campaign, to educate the public in the meaning of the terms used in lieu of "savings." The thought was, apparently, that these banks had been remiss in not publicizing these expressions, and, by intensive advertising, such terms as "special interest" and "thrift" accounts could be identified in the public's mind with national banks in the same fashion that certain catch phrases are identified with particular brands of cigarettes. Even if it be assumed that any such campaign could be successful with the use of the word "savings" barred, the Attorney General was apparently unaware that, by forcing national banks into expensive advertising outlays from which the State-favored institutions are spared, he is conceding that the State is discriminating against national banks and substantially burdening and handicapping them in their efforts to compete with the privileged institutions. Furthermore, with Arthur R. Seaton, Sr., a State Bank Examiner, testifying in this case that these substitute expressions are the "equivalent" of "savings" (R. 63), a statement later confirmed by the Court of Appeals which deemed them "synonymous" with "savings" (R. 688-689), it is strange that the Attorney General would urge the publicizing by national banks through extensive advertising of words which are prohibited by the very language of Section 258(1).

Proof was received at the trial through the Hofstra Survey, confirming the opinion of the bank experts, that the substitute expressions forced upon national banks were not understood by the public, while the meaning of "savings" accounts was understood and that the public does not know that it can open "savings" accounts with national banks. This Survey was carefully and scientifically conducted under the supervision of the Psychology Department of Hofstra College to determine how much knowledge the adult population of Nassau County possessed regarding the meaning of "savings" and the substitute expressions, which kind of account they preferred and what type of institution they preferred in which to open an interest-bearing account.⁴⁴

The Hofstra Survey made the following significant findings:

- (a) Although 85.8% could accurately describe a savings account, only 40.8%, 21.4% and 19.5% respectively, could accurately describe a compound interest account, special interest account and thrift account (Def. Ex. CC, Table I, R. 358, 626).

⁴⁴ The careful manner in which the survey was conducted was the subject of detailed evidence at the trial (R. 172-279, 346-401; Def. Exs. D-U, Z-DD, R. 621-625, 626-641, 660-661), and the trial judge made a careful analysis of the methods of conducting the survey in deciding that it was admissible in evidence (R. 662-664). See also *United States v. 88 Cases*, 187 F. 2d 967; Sorensen and Sorensen, *The Admissibility and Use of Opinion Research Evidence*, 28 N. Y. U. L. Rev. 1213-1261.

- (b) 51.3% knew that mutual savings banks handle savings accounts, while only 7% knew that national banks likewise handle this type of account ⁴⁵ (Def. Ex. CC, Table VII, R. 358, 629-630).
- (c) 57.7% preferred to open a savings account when they wanted to deposit money at interest, while only 21.9%, 10.7% and 1.2%, respectively, preferred a compound interest account, special interest account and thrift account (Def. Ex. CC, Table XIII, R. 358, 634).

As the Trial Court found, the Hofstra Survey proved that the public understands the "meaning of the term 'savings' account for what it really is far better than it understands the meaning of any of the substitute terms" (R. 662), and that, on the basis of all the proof of record (and judicial notice), the word "savings" provokes a much stronger appeal to the eye and the understanding of persons disposed to open an interest-bearing account than do the terms which perforce must be used in their place (R. 662). ⁴⁶ For these and the

⁴⁵ See footnote 3, *supra*, p. 9.

⁴⁶ The Trial Court also suggested strongly that the legislative protection which the State had afforded mutual savings banks' depositors in the past was no longer necessary since the United States Government had insured (through the Federal Deposit Insurance Corporation) all deposits, including those in mutual savings banks, up to the amount of \$10,000 each. It noted that \$10,000 is the maximum amount which such mutual savings banks can now accept from other depositors. (R. 665.) It is interesting to note that all mutual savings banks in the State of New York

other reasons developed at the trial, the Trial Court found that the prohibition contained in Section 258(1) restricts and hampers the Bank in obtaining savings deposits and amounts to an impairment of its business (R. 668).

The Trial Court also held that Section 258(1) was broad enough to prevent the use by the Bank of the word "savings" on any sign, as an identification of the place where such deposits were received, on deposit slips and pass books, in any oral or written advertising, or even to set forth the forbidden words in any of its accounting records or reports to the Comptroller of the Currency (R. 667-668). The court could well have added that the statute is broad enough to prohibit any use by national banks of the word "savings" in connection with the sale or redemption of United States Sav-

belong to the Federal Deposit Insurance Corporation (1952 Annual Report of the Federal Deposit Insurance Corporation, p. 52) and that, within a few months of the approval of the Act of Congress of September 21, 1950 (64 Stat. 873, 12 U. S. C. § 1821a) increasing the maximum insurance protection for each bank account to \$10,000, the State of New York increased from \$7,500 to \$10,000 the limit which a savings bank was permitted to accept from one depositor (L. 1951, Ch. 592. See R. 311-313).

It should also be noted that savings and loan association "accounts" are likewise insured up to \$10,000 through the Federal Savings and Loan Insurance Corporation, of which most savings and loan associations are members (R. 311).

Judge Fuld, in a footnote to his dissent to the Court of Appeals' opinion, stated that the \$10,000 insurance protection had virtually eliminated any risk of loss to those who maintain savings accounts in national banks (R. 691).

ings Bonds or in connection with any payroll "savings" plan to further the sale of these bonds.⁴⁷

The Court of Appeals, in affirming the Appellate Division's reversal of the Trial Court's judgment, did not specifically set aside any of the latter's findings that the State law seriously hampers and interferes with the operations and the efficiency of national banks. It did state that it was "significant, although not conclusive," that no other national bank in the State had used the word "savings,"⁴⁸ and that all other such banks had been able to carry on the business of receiving this "type of deposit" by the use of the "synonymous" substitute expressions; that, further, the number of "savings type" accounts in national banks had increased and they had enjoyed continued prosperity in operating under the State statute (R. 688-689). In the light of the actual effects of the

⁴⁷ The injunction, in the form ordered by the Appellate Division and even in the form as modified by the Court of Appeals (R. 676 and 690), is clearly broad enough to prohibit any reference by the Bank to United States Savings Bonds in its dealings with the public. The Appellate Division stated that the statute did not prohibit the Bank's handling of these bonds since this was the "Government's business" (R. 682). However, it is also the Bank's business as the agent of the Government and neither the statutory language nor the injunction against the Bank provides any exception. The Court of Appeals' opinion did not mention this point, although it was called to its attention by the Bank.

⁴⁸ This is an erroneous statement, see footnote 4, p. 13, *supra*. It is also immaterial since even long time compliance with a State law regulating banking does not foreclose the right to challenge the validity of the law. See *Abie State Bank v. Bryant*, 282 U. S. 765, 766.

operation of Section 258(1), as demonstrated by the Hofstra Survey and the testimony of the several bank presidents referred to above, the conclusion of the Court of Appeals that the savings accounts of national banks have increased and that they have enjoyed continued prosperity becomes largely irrelevant. Obviously, savings deposits might increase and earnings continue even though the statute operated directly to handicap national banks. It is clear that the business might grow, even prosper, despite the existence of handicaps and heavy burdens. The facts are not inconsistent. Thus, it was shown at the trial of this case that the dollar increase in savings deposits was due to an increase of money in circulation and to inflation and that savings in national banks have substantially decreased in relation to demand deposits (R. 112). It was proved that savings in national banks, including the Bank, have substantially decreased in relation to demand deposits.⁴⁰ (R. 444-452). Significantly, the Bank demonstrated statistically that savings deposits in national banks have decreased in relation to savings deposits in savings banks and savings and loan associations (Def. Ex. NN, R. 445, 649-652). The consequence is clear: general statements regarding growth and prosperity of national banks do not prove that the State statute does not substantially burden or interfere with their business.

⁴⁰ The Bank's savings deposits had declined proportionately from over 60% of total deposits in 1941 to approximately 42% in January, 1951 (R. 436; Def. Ex. MM, R. 435, 649).

Since the New York law unduly interferes with the operations and impairs the efficiency of national banks, it must be held invalid as applying to those banks under the authority of the many decisions of the Court which we have set forth in the earlier portions of this brief.

CONCLUSION.

Section 258(1) of the New York Banking Law is in direct conflict with the paramount laws of the United States authorizing national banks to receive savings deposits and with the pertinent administrative rulings. This law also discriminates against national banks and impedes their ability to compete with State financial institutions. By interfering with the receipt of savings deposits and the operations of a savings business, the State law impedes and hampers the efficiency of national banks and renders them less effective as instrumentalities of the United States in providing a uniform, well-regulated banking system for the people of the United States and in serving as component members of the Federal Reserve System. Under long-standing precedents of this Court, the State law is unconstitutional and invalid as applied to national banks.

This case, as was set forth in the Statement as to Jurisdiction, affects not only the Franklin National Bank but also all national banks in the State of New York. Moreover, the decision of the Court of Appeals, unless it is reversed by this Court, will be considered a precedent by other States which may well be induced thereby to enact restrictive legislation covering advertising and other phases of the operations of national

banks and thus weight the competition heavily against national banks and in favor of State financial institutions.

The decision of the court below should be reversed.

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February 17, 1954

APPENDIX

Article VI, Clause 2 of the Constitution of the United States provides:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The pertinent language of Sections 24 and 19 of the Federal Reserve Act (12 U.S.C. §§ 371, 461) provides:

“§ 371. *Loans on farm lands and improved real estate; time and savings deposits; loans for construction of residential or farm buildings.*

“Any national banking association may make real-estate loans secured by first liens upon improved real estate, including improved farm land and improved business and residential properties. A loan secured by real estate within the meaning of this section shall be in the form of an obligation or obligations secured by a mortgage, trust deed, or other instrument upon real estate, which shall constitute a first lien on real estate in fee simple or, under such rules and regulations as may be prescribed by the Comptroller of the Currency, on a leasehold (1) under a lease for not less than ninety-nine years which is renewable or (2) under a lease having a period of not less than fifty years to run from the date the loan is made or acquired

by the national banking association, and any national banking association may purchase any obligation so secured when the entire amount of such obligation is sold to the association. The amount of any such loan hereafter made shall not exceed 50 per centum of the appraised value of the real estate offered as security and no such loan shall be made for a longer term than five years; except that (1) any such loan may be made in an amount not to exceed 60 per centum of the appraised value of the real estate offered as security and for a term not longer than ten years if the loan is secured by an amortized mortgage, deed of trust, or other such instrument under the terms of which the installment payments are sufficient to amortize 40 per centum or more of the principal of the loan within a period of not more than ten years, and (2) the foregoing limitations and restrictions shall not prevent the renewal or extension of loans heretofore made and shall not apply to real-estate loans which are insured under the provisions of sections 1707-1715, 1715b-1715h, 1736-1746, 1748-1748h, 1706c of this title or subchapter X of chapter 13 of this title or which are insured by the Secretary of Agriculture pursuant to sections 1001-1005d of Title 7. No such association shall make such loans in an aggregate sum in excess of the amount of the capital stock of such association paid in and unimpaired plus the amount of its unimpaired surplus fund, or in excess of 60 per centum of the amount of its time and savings deposits, whichever is the greater. Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such

association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located."

"§ 461. Demand and time deposits defined.

"The Board of Governors of the Federal Reserve System is authorized, for the purposes of this section and sections 142, 371a, 371b, 374, 374a, 462, 462a-1 to 466 of this title, to define the terms 'demand deposits', 'gross demand deposits', 'deposits payable on demand', 'time deposits', 'savings deposits', and 'trust funds', to determine what shall be deemed to be a payment of interest, and to prescribe such rules and regulations as it may deem necessary to effectuate the purposes of such sections and prevent evasions thereof: *Provided*, That, within the meaning of the provisions of such sections regarding the reserves required of member banks, the term 'time deposits' shall include 'savings deposits'. (Dec. 23, 1913, ch. 6, § 19, 38 Stat. 270; June 21, 1917, ch. 32, § 10, 40 Stat. 239; Aug. 23, 1935, ch. 614, § 324(a), 49 Stat. 714.)"

The pertinent language of Section 24(Seventh) of the National Bank Act (12 U.S.C. § 24) provides:

§ 24. Corporate powers of associations

"Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts,

bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: * * *

The pertinent language of Section 258(1) of the New York Banking Law provides:

“1. No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word ‘saving’ or ‘savings’ or their equivalent in its banking or financial business, or use any advertisement containing the word ‘saving’ or ‘savings,’ or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word ‘savings’ in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense

the sum of one hundred dollars for every day such offense shall be continued."

Section 1 (e) of Regulations D and Q of the Board of Governors of the Federal Reserve System provides as follows (24 C.F.R. §§ 204.1, 217.1):

"(e) Savings deposits.—The term 'savings deposit' means a deposit, evidenced by a pass book, consisting of funds (i) deposited to the credit of one or more individuals, or of a corporation, association or other organization operated primarily for religious, philanthropic, charitable, educational, fraternal or other similar purposes and not operated for profit,⁴ or (ii) in which the entire beneficial interest is held by one or more individuals or by such a corporation, association or other organization, and in respect to which deposit—

(1) The depositor is required, or may at any time be required, by the bank to give notice in writing of an intended withdrawal not less than 30 days before such withdrawal is made;

(2) Withdrawals are permitted in only two ways, either (i) upon presentation of the pass

⁴⁴ Deposits in joint accounts of two or more individuals may be classified as savings deposits if they meet the other requirements of the above definition, but deposits of a partnership operated for profit may not be so classified. Deposits to the credit of an individual of funds in which any beneficial interest is held by a corporation, partnership, association or other organization operated for profit or not operated primarily for religious, philanthropic, charitable educational, fraternal or other similar purposes may not be classified as savings deposits.

book, through payment to the person presenting the pass book, or (ii) without presentation of the pass book, through payment to the depositor himself but not to any other person whether or not acting for the depositor.⁵

“The presentation by any officer, agent or employee of the bank of a pass book or a duplicate thereof retained by the bank or by any of its officers, agents or employees is not a presentation of the pass book within the meaning of this regulation except where the pass book is held by the bank as a part of an estate of which the bank is a trustee or other fiduciary, or where the pass book is held by the bank as security for a loan. If a pass book is retained by the bank, it may not be delivered to any person other than the depositor for the purpose of enabling such person to present the pass book in order to make a withdrawal, although the bank may deliver the pass book to a duly authorized agent of the depositor for transmittal to the depositor.

“Every withdrawal made upon presentation of a pass book shall be entered in the pass book at the time of the withdrawal, and every other withdrawal shall be entered in the pass book as soon as practicable after the withdrawal is made.”

⁵ Presentation of a pass book may be made over the counter or through the mails; and payment may be made over the counter, through the mails or otherwise, subject to the limitations of paragraph (2) above as to the person to whom such payment may be made.”

MAR 3 1954

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

THE FRANKLIN NATIONAL BANK OF
FRANKLIN SQUARE,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

APPELLEE'S BRIEF

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Dated, New York, N. Y.,
February 24, 1954.

BLEED THROUGH

INDEX

	PAGE
Introduction	1
Opinions Below	5
Statement	5
Section 258 of the New York Banking Law	7
Section 24 of the Federal Reserve Act	8
The Pleadings	10
The Testimony	13
A. The Conclusive Proof of Defendant's Violation of the Statute	14
B. The Defendant's Case	20
Analysis of the Opinions of the New York Courts	30
A. The Special Term Opinion	30
1. How Special Term Disregarded Respond- ent's Misleading Use of the Words "Saving" and "Savings"	31
2. Special Term's Misapplication of the Su- premacY Doctrine	38
B. The Appellate Division Opinions	44
C. The Court of Appeals Opinions	47
POINT I—Section 258 of the New York Banking Law, prohibiting banks other than savings banks from using the word "saving" or "savings" consti- tutes a proper exercise of New York's police power. It is designed to protect the public from the consequences of its own ignorance and care- lessness as well as from intentional misrepresen- tation, in identifying as "savings banks" insti- tutions which do not have all the safeguards of New York's "savings banks"	51
A. The police power is available to protect the public from the consequences of its own ig-	

norance and carelessness as well as from deliberate fraud. The prohibition of the use of misleading terms is a proper exercise of the police power	51
B. Section 258 of the Banking Law indicates a legislative determination to protect the public from the misleading use of the words "saving" and "savings" in advertising any banking business. <i>People v. Binghampton Trust Co.</i> , 139 N. Y. 185; <i>People v. Franklin National Bank</i> , 305 N. Y. 453	60
POINT II—National banks may not disregard a State standard of honest business dealing	77
POINT III—Congress has not authorized national banks to violate State standards of <i>fair</i> competition by using the words "saving" or "savings" in advertising the performance of their functions as national banks. Nor has Congress authorized national banks in any other way to masquerade as State-organized "savings banks"	85
(1) On the contrary, many significant provisions of the National Bank Act (12 U. S. C. A., ch. 2, §§ 21-213) indicate a firm determination upon the part of Congress to have national banks exercise their federally-granted powers in the States in which they are located in a manner which will not conflict with the standards which govern State-chartered banks	87
(2) Section 24 of the Federal Reserve Act (12 U. S. C. A., § 371), relied on by the defendant and by Special Term as the statutory basis for their claim of impairment of the powers of a federal instrumentality, does not purport to grant to any national bank the	

	PAGE
power to advertise, using the words "saving" or "savings", or to pass itself off otherwise as a State-organized savings bank	89
(3) The avowed purpose of Congress, in amending Section 24 of the Federal Reserve Act in 1927, was to extend the power of national banks to make secured loans upon real estate. The clarification in 1927 of national bank power "hereafter as heretofore" to "receive" savings deposits did not authorize national banks to advertise in a manner theretofore and since regarded as misleading in New York	91
(4) No federal administrative action has been taken which could override the New York substantive law	96
(5) The power granted to national banks to receive " <i>savings deposits</i> " does not carry with it, by implication, a privilege to use the words "saving" or "savings", in advertising, when such usage has been found by a State Legislature to be misleading. Congress has not clearly manifested any intention to exclude such an exercise of the police power	99
POINT IV—Section 258, which is non-discriminatory, since it applies to State-chartered banks as well as to national banks, is constitutional. It does not violate the Supremacy clause of the Federal Constitution	104
Authorities Relied on By Special Term Distinguished	115
CONCLUSION	118
APPENDIX	122

TABLE OF CASES

	PAGE
Abie State Bank v. Bryan, 282 U. S. 765, 782	76
Abilene Nat'l Bank v. Dolley, 228 U. S. 1	112
Allen Bradley Local v. Board, 315 U. S. 740, 749	103
American Foundries v. Robertson, 269 U. S. 372, 381 ..	59
Amoskeag Savings Bank v. Purdy, 231 U. S. 373	113
Anderson National Bank v. Lockett, 321 U. S. 233 ..	78, 82
Aronberg v. Federal Trade Commission, 132 F. 2d 165-7	57
Assaria State Bank v. Dolley, 219 U. S. 121	51
Asbell v. Kansas, 209 U. S. 251	115
Aunt Jemima Mills v. Rigney, 247 F. 407, 409	59
Baltimore National Bank v. Tax Commission, 297 U. S. 209	109
Bank of Redemption v. Boston, 125 U. S. 60	35, 68-70
Barrett v. Bloomfield Savings Institution, 54 Atl. Rep. (N. J.) 543, 552	72
Biddles, Inc. v. Enright, 239 N. Y. 354	53
Board of Comm'rs v. U. S., 308 U. S. 343, 352	99
Bowen v. City of Schenectady, 136 Misc. 307, aff'd 231 App. Div. 779	54
Burns Nat. Bank v. Duncan, 265 U. S. 17	77
Brattan v. Chandler, 260 U. S. 110	54
Carlsbad v. W. T. Thackeray & Co., 57 Fed. 18	57
Carolene Products Co. v. United States, 323 U. S. 18 ..	52
Charles of Ritz, etc. v. Federal Trade Commission, 143 F. 2d 676, 680	57
Chicago &c. Ry. Co. v. Solan, 169 U. S. 133	115
City of Cleveland v. United States, 323 U. S. 329 ...	108
Citizens National Bank v. Donnell, 195 U. S. 369 ...	102
Clark v. First Nat. Bank of Morrisville, 130 Misc. 352, 354	78
Collector v. Day, 11 Wall. 113	106

Colorado Bank v. Bedford, 310 U. S. 41, 48, 53 . . .	83, 99, 112
Comanche v. Johnston, 170 Okl. 515, 41 P. 2d 115 . .	81
Commonwealth v. McHugh, 326 Mass. 249 (1950) . . .	85
Conn. Mut. Life v. Moore, 333 U. S. 541	84
Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173	59
Cross v. North Carolina, 132 U. S. 131	80
Crossman v. Lurman, 171 N. Y. 329, aff'd 192 U. S. 189	52, 115
Dakin v. Bayly, 290 U. S. 143	80
Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83	69
Davis v. Elmira Savings Bank, 161 U. S. 275, 283 . . .	81, 82
Dent v. West Virginia, 129 U. S. 114, 122	52, 54
Des Moines Bank v. Fairweather, 263 U. S. 103, 111 . .	112
Dillingham v. McLaughlin, 264 U. S. 370, 374	52, 119
Earle v. Pennsylvania, 178 U. S. 449	83
Eastern Const. Co. v. Eastern Engineering Co., 246 N. Y. 459, 463	59
Easton v. Iowa, 188 U. S. 220	43, 80, 117
Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665	59
Emer. Fleet Corp. v. West. Union, 275 U. S. 415, 425-426	81
Engel v. O'Malley, 219 U. S. 128; 31 S. Ct. 190; 55 L. Ed. 128, affirming 182 Fed. 365	43, 51, 111
Esso Standard Oil Co. v. Evans, 345 U. S. 495	108
Farmers and Mechanics National Bank v. Dearing, 91 U. S. 29	81, 102
Farmers and Merchants Bank v. Federal Reserve Bank, 262 U. S. 649	78
Federal Trade Comm. v. Algoma Co., 291 U. S. 67. . .	57

	PAGE
Federal Trade Commission v. Real Products Corp., 90 F. 2d 617	55
Federal Trade Comm'n v. Royal Milling Co., 288 U. S. 212, 216	57
Fidelity National Bank & Trust Co. v. Enright, 264 F. 236	43, 116
First National Bank v. California, 262 U. S. 366 ..	43, 77, 81, 117
First National Bank v. Fellows, 244 U. S. 416	87
First National Bank v. Hartford, 273 U. S. 548	89
First National Bank v. Missouri, 263 U. S. 640	81, 83, 99, 100
First Nat. Bank v. Tax Comm'n, 289 U. S. 60, 64	113
First National Bank v. Union Trust Co., 244 U. S. 416	116
First National Bank of Grand Forks v. Anderson, 172 U. S. 573	80
First Trust & Savings Bank of Oneida v. Kent, 119 F. 2d 151, cert. den. 314 U. S. 648	89
General Motors Corp. v. Federal Trade Commission, 114 F. 2d 33	56
Gimbel Bros. v. Federal Trade Commission, 116 F. 2d 578	55
Graves v. Minnesota, 272 U. S. 425, 427	52
Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466	105
Gulf Oil Corp. v. Federal Trade Commission, 150 F. 2d 106	55
Guthrie v. Harkness, 199 U. S. 148	81
Hall v. Geiger Jones, 242 U. S. 539	53, 111
Hammond v. Pennock, 61 N. Y. 145, 152	58
Hanover Milling Co. v. Metcalf, 240 U. S. 403, 416 ...	58
Hebe Co. v. Shaw, 248 U. S. 297	52
Helvering v. Gerhardt, 304 U. S. 405	106, 108

Herring, etc., Safe Co. v. Hall's Safe Co., 208 U. S. 554, 559	59
Higgins v. Higgins Soap Co., 144 N. Y. 462, 471	58
Holding Co. v. Reis, 240 N. Y. 424, 427	54
Hurst v. Federal Trade Commission, 268 F. 874	56
Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153 ...	53
Jennings v. U. S. Fidelity & Guaranty Co., 294 U. S. 216, 219	78, 80, 83
Kern-Limerick, Inc. v. Scurlock, U. S., de- cided February 8, 1954	108
Kraysler v. Kraysler, 251 App. Div. 446	59
L. & C. Mayers Co. v. Federal Trade Commission, 97 F. 2d 365	55
Lauer v. Bayside National Bank, 244 App. Div. 601. .	78, 84
Lawrence Mfg. Co. v. Tennessee, 138 U. S. 537, 549	
Lewis v. Fidelity Deposit Co., 292 U. S. 559, 564-5 78, 83, 84, 87	
Lionberger v. Rouse, 9 Wall. 468	113
Loughman v. Town of Pelham, 126 F. 2d 714; 12 U. S. C. A., § 90	88
Madrua v. Superior Court of California, U. S., decided Jan. 18, 1954	96
Matter of Baldwinsville Fed. Sav. & Loan Assn., 268 App. Div. 414 (4th Dept., 1944)	78, 84
Matter of Hickmott, 256 App. Div. 1047	80
Matter of Keene, 152 Misc. 424, 425	78
Matter of Schwamm v. United National Bank of Long Island, 269 App. Div. 692	84
Matter of Tartaglia v. McLaughlin, 297 N. Y. 419, 425	115
Maricopa Co. v. Valley National Bank, 318 U. S. 357	108
Maurer v. Hamilton, 309 U. S. 598, 614	103

MCClellan v. Chipman, 164 U. S. 347	78, 79, 81
McCulloch v. Maryland, 4 Wheat. 316 ..	43, 104, 106, 108, 115
McLean v. Arkansas, 211 U. S. 539, 550	112
Mercantile Bank v. New York, 121 U. S. 138...	2, 69, 71, 118
Merchants Exchange v. Missouri, 248 U. S. 365	53
Merrick v. Halsey & Co., 242 U. S. 568	111
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523-4	110
Middletown Trust Co. v. Middletown National Bank, 110 Conn. 13, 147 Atl. 22	78, 81, 96, 117
Miller v. Milwaukee, 272 U. S. 713	106
Missouri, Kansas & Texas Ry. Co. v. Haber, 169 U. S. 613	115
Missouri ex rel. Burnes National Bank v. Duncan, 265 U. S. 17	43, 87, 117
Musco v. United Sureth Co., 196 N. Y. 459 (1909)	
My-T-Fine v. Samuels, 69 F. 2d 76, 77	58
Nagle v. Herold, 30 F. Supp. 905	89
Nakdimen v. First Nat. Bk. of Fort Smith, 117 Ark. 303, 6 S. W. 2d 505, cert. den. 278 U. S. 635	80
Napier v. Atlantic Coast Line, 272 U. S. 605, 611	103
National Bank v. Commonwealth, 9 Wall. 353 ..	78, 80, 112
National Bank v. Graham, 100 U. S. 699	80
National Bank v. Phoenix Warehousing Co., 6 Hun 71	88
National Labor Relations Board v. Bank of America, etc., 130 F. 2d 624, 626-627, cert. den. 318 U. S. 791	81
New York v. United States, 326 U. S. 572	105
Nobel v. Haskell, 219 U. S. 104, 111	51
Northern Pacific Ry. Co. v. Washington, 222 U. S. 370, 379	115
Oklahoma Tax Commission v. Texas Co., 336 U. S. 342	104
Otis v. Parker, 187 U. S. 606, 609	53

INDEX

ix

PAGE

Pacific Co., Ltd. v. Johnson, 285 U. S. 480, 493	106
Parker Pen Co. v. Federal Trade Commission, 159 F. 2d 509	55
Penn Dairies v. Milk Control Comm., 318 U. S. 261	108, 110
Pennsylvania R. R. Co. v. Hughes, 191 U. S. 477	115
People v. Bernstein, 237 App. Div. 270	54
People v. Binghamton Trust Co., 139 N. Y. 185, 190	40, 60-63, 72, 119
People, etc. v. Coast Federal Sav. & Loan Ass'n, 98 F. Supp. 311	84
People v. Cole, 219 N. Y. 98	55
People v. County Transportation Co., 303 N. Y. 391	103
People v. Doty, 80 N. Y. 227, 230, 235	61
People v. Franklin National Bank, 200 Misc. 557	5
People v. Franklin National Bank, 281 App. Div. 757	5, 49
People v. Franklin National Bank, 305 N. Y. 453. .3, 5, 41, 60	
People ex rel. Bennett v. Laman, 277 N. Y. 368, 375	54
People v. Mari, 260 N. Y. 383	55
People v. Somme, 120 App. Div. 20, aff'd 190 N. Y. 541	54
Pitman v. H. O. L. C., 308 U. S. 21	108
P. Lorillard Co. v. Federal Trade Commission, 186 F. 2d 52, 58	56
Plumley v. Mass., 155 U. S. 461	52, 114
Pollock v. Board of Regents, 277 App. Div. 808, leave den. 277 App. Div. 825	54
Pollock v. Board of Regents, 266 App. Div. 696, aff'd 291 N. Y. 720	54
Powell v. Pennsylvania, 127 U. S. 678	53
Pronger v. Old National Bank, 20 Wash. 618, 56 Pac. 391	80
Provident Savings Institution v. Malone, 221 U. S. 660	72, 83
Purity Extract Co. v. Lynch, 226 U. S. 192, 204	52

	PAGE
Quaker Oats Co. v. City of New York, 295 N. Y. 527, aff'd 331 U. S. 787	58, 115
Queenside Hills Realty Co. v. Saxl, 328 U. S. 80, 82 ..	51
Radio Officers' Union v. Labor Board, U. S., decided February 1, 1954	32
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120 (338 U. S. 586, 599-600)	97
Rast v. Deman & Lewis, 240 U. S. 342, et seq.	53
Rawlins v. Wickham, 3 De G. & J. 304, 317	58
Reconstruction Finance Corp. v. Menihan Corp., 312 U. S. 81	109
Redgrave v. Hurd, L. R. 20 Ch. D 1, 12, 13	58
Regents v. Carroll, 338 U. S. 586	97
Reid v. Colorado, 187 U. S. 137	115
Roman v. Lobe, 243 N. Y. 51	54
Roschen v. Ward, 279 U. S. 337, 339-340	38
Roth v. Delano, 338 U. S. 226	78, 81, 83
Rushton, etc. v. Michigan Nat. Bank, 298 Mich. 417, 299 N. W. 129, 136 A. L. R. 458	87
Sage Stores Co. v. Kansas, 323 U. S. 32	52
Salsburg v. Maryland, U. S., decided Janu- ary 11, 1954	51
Savage v. Jones, 225 U. S. 501	9, 114
Schallenger v. First State Bank, 219 U. S. 114	51
Schmidinger v. Chicago, 226 U. S. 578	53
Schramm v. Bank of California, 143 Ore. 546, 578, 20 P. 2d 1093, 1103-4	82
Seabury v. Green, 294 U. S. 165, 169	78
Semler v. Dental Examiners, 294 U. S. 608	53
Singleton v. Harriman, 152 Misc. 323, aff'd 241 App. Div. 857	80
Southern Ry. Co. v. Reid, 222 U. S. 424, 442	115
Springfield Inst. for Savings v. Worcester F. S. & L. Assn., 329 Mass. 124, 107 N. E. 2d 315, cert. den. 344 U. S. 884	85

INDEX

xi

	PAGE
Standard Oil Co. of New Jersey, 341 U. S. 428, 441 ..	78
Stanley Laboratories v. Federal Trade Commission, 138 F. 2d 388, 392-3	57
Starr v. Schram, 143 F. 2d 561	88
State v. People's National Bank, 75 N. H. 27, 70 Atl. 542	72, 78
Teeval Co. v. Stern, 301 N. Y. 346, 361, 365; cert. den. 340 U. S. 876	115
Tiffany v. National Bank, 18 Wall. 409	101
Tobin v. Hymers, 99 F. 2d 740	89
Trade Commission v. Raladam Co., 316 U. S. 149	55
Tradesmen's National Bank v. Tax Comm., 309 U. S. 560	89, 112
Trading Stamp Cases	53
United Drug Co. v. Rectanus Co., 248 U. S. 90, 100 ...	58
Union Nat. Bank v. Louisville, etc. R. Co., 163 U. S. 325	88, 100, 102
United States v. 5 Gambling Devices, U. S., decided December 7, 1953	63
United States v. Manufacturers Trust Company, 198 F. 2d 366	98
United States v. Rumely, 345 U. S. 41	5
United States Pipe & Foundry Co. v. City of Hornell, 146 Misc. 812, 815	78
United States Shipping Board Emergency Fleet Cor- poration v. Western Union Telegraph Co., 275 U. S. 415, 416, 425, 48 S. Ct. 198, 72 L. Ed. 345....	81
Van Reed v. People's National Bank, 198 U. S. 554	83
Waite v. Dowley, 94 U. S. 527, 533	78, 83
Weber v. Stoddard, 270 App. Div. 865, leave den. 270 App. Div. 960	54

	PAGE
Woodbury v. Woodbury, 23 F. Supp. 162, 168	58
World's D. M. Assn. v. Pierce, 203 N. Y. 419, 424, 425	59
Yonkers v. Downey, 309 U. S. 590, 597	99
Zenith Radio v. Federal Trade Commission, 143 F. 2d 29, 31	56

OTHER AUTHORITIES

Constitution of the United States	
Article I, Sect. 8	48
Article VI, Clause 2	97
Constitution of the State of New York, Article X, § 3	1, 118, 122

NEW YORK STATUTES

New York Banking Law	
Article VI	2, 8, 40, 74, 76, 77, 99
Article X	76
Article X-b	8
Section 2-b	7, 39
Section 10	53
Section 235, Subd. 18	1, 8, 36
Section 245	16, 75
Section 258	7, 11-14, 17, 27-30, 32, 39-46, 51-76, 102, 118-120

	PAGE
New York Personal Property Law, § 21(e)	1
Laws of the State of New York	
L. 1838, Ch. 260	73
L. 1858, Ch. 132	61
L. 1869, Ch. 213	73
L. 1875, Ch. 371, § 49	61, 73
L. 1882, Ch. 409, § 283	64
L. 1892, Ch. 689	73
L. 1904, Ch. 568, § 131	64
L. 1905, Ch. 564	2, 64
L. 1909, Ch. 497	65
L. 1914, Ch. 369	65, 66
L. 1916, Ch. 90	66
L. 1920, Ch. 128	66
L. 1923, Ch. 22	66
L. 1932, Ch. 604	67
L. 1934, Ch. 255	67
L. 1938, Ch. 352	67
L. 1941, Ch. 585	67
L. 1952, Ch. 546	66
Opinions of the New York Attorney General	
1898 Report of the Attorney General, 265-267 ..	68
1902 Report of the Attorney General, 314-315 ..	68
1907 Report of the Attorney General, 473-475 ..	68-70
1908 Report of the Attorney General, 382-383 ..	68, 71
1917 Report of the Attorney General (10 State Department Reports), 491	68, 71, 72
1922 Report of Attorney General, 139	60

FEDERAL STATUTES

Revised Statutes of the United States	
R. S. 5219	89
United States Statutes at Large	
38 Stat. 273	91
44 Stat. 1232	92

	PAGE
Federal Reserve Act	
Section 19	9, 72, 90, 91
Section 24	2, 8, 38, 46, 90-96, 119
Revenue Act of 1951, § 313	86
United States Code	
Title 12	
Section 21, <i>et seq.</i>	10, 87
Section 24 (Seventh)	13, 100
Section 24 (Eighth)	87
Section 36, subd. c	87
Section 62	84
Section 81	88
Section 85	88, 91
Section 90	88
Section 192	89
Section 194	89
Section 371	9, 13, 36, 38, 40, 43, 46, 89, 90, 119
Section 461	9, 90
Section 548	89
Sections 583-585	13, 77, 119
Section 586	77, 119
Section 588a	13
Section 1441	119
Section 1464	8, 85
Section 1811, <i>et seq.</i>	103
Title 15	
Section 45	56
Section 52b	56
Title 18	
Section 709	119
Title 31	
Section 757e, subds. h and i	29

CONGRESSIONAL REPORTS AND RECORD

	PAGE
use Report (No. 83, 69th Cong., 1st Sess.)	93
ate Report, No. 781; re 1951 Revenue Act	70
Congressional Record 2833	94
<i>Miscellaneous:</i>	
u. R. A. 148	59
o A. L. R. 1095n	59, 60
Columbia L. Rev. 416, 418n	80
erings California Code, §§ 350, 1100, 3394	95
Kinney's New York Banking Law	73
Michie on Banks & Banking, Ch. 15, §§ 3-5	78
aton's Digest of Legal Opinions	
(1926 Ed.), §§ 637, 637a; Definitions	95, 125
(1940 Ed.), (1950 Ed.)	118
15 Federal Reserve Board Opinion	94-96
ederal Reserve Regulations "D" and "Q"	9, 98
ederal Reserve Operating Circular No. 15	98, 99
935 Report of New York State Bankers Association	122
939 Opinion of the Comptroller of the Currency ...	93, 96
951 Report of F.D.I.C.	103, 104

BLEED THROUGH

IN THE
Supreme Court of the United States

THE FRANKLIN NATIONAL BANK OF
FRANKLIN SQUARE,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLEE'S BRIEF

Introduction

(1)

New York has, by its Constitution (Art. X, § 3, Appendix, p. 122) and by legislation which has had a long history, fostered the development of great public confidence in "savings banks," a distinctive type of State banking institution whose powers are constitutionally required to be uniform and whose investments are strictly regulated by statute (N. Y. Banking Law, § 235).¹ New

¹ In New York, savings bank investments are regarded as a standard of legal investments for the guidance of trustees generally. New York Personal Property Law, § 21 (c).

York's mutual savings banks are not permitted to engage in commercial banking (N. Y. Banking Law, Art. VI).²

To protect the public against deception, New York has, at least since 1858, enacted statutory provisions prohibiting persons, banks, *banking associations*, and institutions other than savings banks from advertising themselves as "savings banks." Since 1905, New York has deemed the use of the word "savings" to be misleading when used by non-savings banks (L. 1905, ch. 564). Since 1914, national banks have been specifically named (along with all other non-savings banks, including New York's own commercial banks, whose powers are substantially the same as national banks) among the banks by whom usage of the words "saving" or "savings" has been prohibited.

New York recognizes the power of national banks to engage in the business of receiving passbook-evidenced interest-bearing deposits. It does not believe, however, that Congress in 1927, by amending section 24 of the Federal Reserve Act, specifically to authorize national banks "to receive" savings deposits "as heretofore" authorized national banks to advertise in a manner which New York, at least since 1905 has regarded as misleading. The very terms of the amendment clearly indicated Congressional intention to have national banks continue to *conform* to their existing practices in the States of their location rather than to establish a national uniformity of practice. National bank practice in New York sustains our view.

We regard the preservation of the identity of our State banking institutions as an essential element of the con-

² New York has traditionally set up special safeguards to protect the small depositors who have been encouraged to make deposits in mutual savings banks. *Mercantile National Bank v. New York*, 121 U. S. 138. Article VI of our Banking Law contains numerous provisions designed to give to mutual savings bank depositors special assurance of the safety of their deposits.

tinued maintenance of this Nation's dual banking system. We trust that the Court will not frustrate our efforts to maintain such identity, particularly since Congress has at no time seen fit to designate national banks as "savings banks." Federal Reserve Board Counsel, presented with a somewhat similar problem in 1915 by a California statute, conceded, at least (see Appellant's Brief, p. 45): "national banks should not be permitted to advertise themselves as 'Savings Banks' since they are not so designated in the [Federal Reserve] act."

Our position upon this appeal, therefore, is that the New York Court of Appeals has correctly held that while Congress has by section 24 of the Federal Reserve Act prescribed a kind of business that national banks may carry on (receiving "savings deposits"), our statute still interdicts the use in that business of certain non-essential words ("saving" or "savings") to avoid misleading our people into believing that commercial banks, like the defendant, are mutual savings banks (305 N. Y. 453, 460-461).

(2)

No Act of Congress purports to endow national banks with any power to advertise their business by words which contravene the standards of fair business dealing which prevail in a State in which the national bank is authorized to do business. We believe that it will, therefore, be unnecessary in this case for the Court to determine whether Congress has such power. At least until Congress has explicitly purported to grant national banks a privilege to violate safeguards against misleading advertising which a State applies to all other persons and forms of business organization doing business within its borders (including all of its own state-chartered commercial banks authorized to receive passbook-evidenced interest-bearing deposits), we do not believe that this Court will find that Congress

has granted national banks such an extraordinary privilege. Nor do we believe that the Court will conclude that, upon the present record, it has been shown that the proper functioning of the national banking system requires national banks to advertise in a misleading fashion.

(3)

New York has not sought and does not seek to prevent national banks doing business within its borders from competing *fairly* for depositors' funds. Indeed, we believe that this Court may judicially notice the fact that, while thus competing, national banks have reached a peak of their development in our State.

In New York, *the practice of national banks* other than the defendant³ has been to employ words whose usage the State Banking Department and the Court of Appeals have not deemed misleading—such as “Special Interest Account,” “Thrift Account” and “Compound Interest Account”—to induce depositors to maintain passbook-evidenced interest-bearing accounts with them (R. 61, 66-67), 301). In the Court of Appeals the defendant conceded that these terms were the other “words presently used by national banks” (Def’t’s Court of Appeals Brief, p. 21). The appellant still concedes (p. 71) that such has been the “practice * * * of commercial banks” in New York.

³ The appellant now (footnote 4, p. 13; and footnote 48, p. 95) claims that the Record is to the contrary. To prove this alleged error by the Court of Appeals, appellant desperately refers to a New York State Bank Examiner’s Report relating to this case which shows that *on a single occasion one other national bank used the word “savings”*. The Court of Appeals finding, as to the virtually uniform practice of national banks in New York to refrain from using the prohibited words and to designate their interest-bearing accounts as such or as thrift accounts, is substantially correct. We do not believe this Court will disturb the Court of Appeals finding by reason of the trivial discrepancy which has been noted.

We believe that the *general banking practice* of national banks in New York, accurately to describe their passbook-evidenced *interest-bearing accounts* in the foregoing fashion is of vital significance in this case. We also regard as significant the failure of national banks generally to act in defiance of the New York statute, to have an exception placed in the statute in their favor or to procure express authority from Congress to advertise for "savings" accounts, especially since our statute has specified "national" banking associations since 1914 among the non-savings banks to which the prohibition applied.

We submit that this inaction and the *general practice of national banks* are vitally significant on the subjects of practical construction, Congressional intention and the necessity for national banks to use the prohibited words in order to perform their banking functions. They are entitled to far more weight than the *post litem motam* evidence developed for purposes of this suit by the defendant. *United States v. Rumely*, 345 U. S. 41.

Opinions Below

The opinion of the New York Supreme Court (R. 654) is reported in 200 Misc. 557. The opinions of the New York Appellate Division (R. 679) are reported in 281 App. Div. 757. The opinions of the New York Court of Appeals (R. 684) are reported in 305 N. Y. 453.

Statement

The defendant appeals from a judgment of the New York Court of Appeals dated July 14, 1953 that modified and affirmed, as modified, a judgment entered in the office of the Clerk of Nassau County on February 11, 1953, which, pursuant to an order of the Appellate Division of the New

York Supreme Court dated January 12, 1953, had reversed, on the law and the facts, a judgment of the New York Supreme Court, at Special Term, entered June 8, 1951, which had dismissed the complaint herein after trial.

As modified by the Court of Appeals, the judgment for the plaintiff restrains the defendant (R. 685, 690, 693, 695):

“from advertising or otherwise using the word ‘saving’ or ‘savings’ in relation to its banking or financial business in its dealings with the public.”

The State had sued to restrain the defendant, a national bank, from advertising in any manner or form or exposing any sign as a savings bank by the use of the term “saving” or “savings” or their equivalent and/or soliciting or receiving deposits as a savings bank in the State of New York; and from using the term “saving” or “savings” or their equivalent in the defendant’s banking or financial business, in violation of subdivision one of Section 258 of the New York State Banking Law. The Trial Judge held the statutory provision to be unconstitutional and dismissed the complaint upon that ground. The Appellate Division reversed the Trial Court and held that the defendant had “failed to establish its defense of unconstitutionality.” The Court of Appeals sustained the decision of the Appellate Division on the issue of constitutionality, but modified the terms of the injunction by striking therefrom a provision prohibiting the defendant from “soliciting or receiving deposits as a savings bank,” since it found no evidence in the record that the defendant had violated or intended to violate the statutory prohibition against such solicitation or receipt (R. 690, 694).

The principal question presented by this appeal, therefore, concerns the constitutionality of the first subdivision of Section 258 of the New York Banking Law.

Section 258 of the New York Banking Law

Banking Law, Section 258, subdivision one, pursuant to which this suit was commenced, provides:

"No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings', or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

As used in section 258, the term "savings bank" refers only to a "corporation organized or subject to the provisions of Article VI of the New York Banking Law (Banking Law, § 2, subd. 4).

This statutory provision, as we shall show, has the proper police power purpose of protecting the public from a particular type of misleading advertising. It is designed to prevent a use of words or advertising, by persons or banks *other than mutual savings banks* organized under the New York Banking Law, likely to mislead people into be-

lieving that they are dealing with such *banks*. The New York Court of Appeals and Legislature have found, that the use by commercial banks (State as well as national) in their business or their advertising, of the words "saving" or "savings" or their equivalent, is calculated so to mislead.

The Legislature has made the prohibition inapplicable to any "savings and loan association" (federal or state) presumably because it regards such usage as non-deceptive. Furthermore, such an exception appears to be required, as to federal savings and loan associations, by an express provision of a federal statute (12 U. S. C. A., § 1464) which authorizes the organization and incorporation of associations to be known as "Federal Savings and Loan Associations."

The Legislature has also permitted certain organizations *which do not accept savings deposits from the public*, but which are utilized by mutual savings institutions, to use the word "savings" in their names. Such usage presumably has also been found by the Legislature not to be of a character likely to deceive the public in the selection of an institution in which to place its savings. As to the powers of the Savings and Loan Bank, see New York Banking Law, Art. X-B; and as to savings-bank-owned trust companies, see New York Banking Law, § 235, subd. 18.

Section 24 of the Federal Reserve Act

Section 24 of the Federal Reserve Act (12 U. S. C. A., § 371) provides, in part:

"Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed

the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located."

The Federal Reserve Board has, in exercise of the power granted to it by section 19 of the Federal Reserve Act (12 U. S. C. A., § 461) defined the term "savings deposits" in two of its Regulations ("D", dealing with "Reserves of Member Banks" and "Q", dealing with "Payment of Interest Deposits") simply to mean a deposit evidenced by a passbook, in respect to which the depositor is or may be required by the bank to give 30 days written notice of an intended withdrawal and as to which withdrawals are permitted in only two ways—upon presentation of the passbook, to the person presenting the pass book, or through payment to the depositor himself.

Although the deposits, so defined, bear some of the characteristics of savings deposits made in New York savings banks, the fact remains that the assets so deposited are not required to be segregated from demand deposits and are not subject to the same investment restrictions imposed by law upon New York savings banks.

"Savings deposits" made in a national bank are merely interest-bearing deposits evidenced by a passbook which are not subject to withdrawal on demand, forming part of a national bank's resources that are available even for unsecured personal or business loans.

Fairly interpreted (*Savage v. Jones*, 225 U. S. 501, 533-534), section 24, which authorizes the receipt of such deposits "hereafter as heretofore", contained no blanket authorization to national banks to use the words "saving" or "savings", even where such usage had been theretofore regarded as misleading or deceptive. And we know of no Constitutional principle which allow the words of a Congressional Act to be "quoted" in a misleading fashion.

The Pleadings

(1)

The complaint herein alleges that the defendant was and is a national banking association organized under the provisions of the National Banking Act (12 U. S. C. A., Sec. 21, *et seq.*) and authorized by its charter to transact the business of banking in the Village of Franklin Square, Nassau County, New York (Par. First, R. 3); and that defendant was never authorized or licensed to transact business as a savings bank in New York or to hold itself out to the public as such (Par. Third). The defendant admits that it is not a savings bank organized under the laws of the State of New York or authorized to represent itself as such (Answer, Par. Second, R. 6).

The complaint calls attention to the provision of subdivision one of Section 258 prohibiting the use of the word "saving" or "savings" in the banking or financial business of banks other than savings banks and savings and loan institutions and to the provision prohibiting any individual or corporation, other than a savings bank, from soliciting or receiving deposits as a savings bank (Par. 2). The answer sets forth the words of the statutory provision (Answer, Par. First).

The complaint alleged that since 1947, defendant had continued to use the term "saving" or "savings" in its banking, financial business and dealings with the public in this State (Par. Fourth). And, it further alleged that since 1947, defendant had solicited savings accounts by printed and exposed signs, circulars, stationery and varied and sundry advertising media, inclusive of newspapers, in and on which the defendant publicly advertised and circulated the word "saving" or "savings" (Par. Fifth). These allegations the defendant formally denied, but ad-

mitted that it had "used the term 'saving' or 'savings' in its business" (Answer, Par. Third).

The complaint further alleged that the defendant's use of the words "saving" or "savings" was calculated to and had the tendency and effect of leading the public to believe that the defendant, contrary to fact, was incorporated as a "savings bank" with all of the attendant safeguards and benefits (Par. Sixth). This allegation the defendant denied (Answer, Par. Fourth).

It was then alleged that the defendant's use of the word "saving" or "savings" violated the provisions of subdivision one of Section 258 of the Banking Law (Complaint, Par. Seventh). This allegation, too, the defendant denied (Answer, Par. Fifth).

The complaint further alleged that, prior to commencement of this suit, the People had demanded that defendant terminate the use of the word "saving" or "savings" or their equivalent in its banking, financial business and dealings with the public in New York and exclude those words from its advertising matter circulated by it in the solicitation of business and deposits from the public in violation of the Statute, but that the defendant had refused to do so (Par. Eighth). The defendant admitted that prior to commencement of this suit, the People had demanded that defendant terminate the use of the words "saving" or "savings" in its advertising (Answer, Par. Sixth).

Prior to conclusion of the People's case, the complaint was amended to include an allegation (designated as Par. 8-A) to assert that by the acts complained of, the defendant had practiced fraud and deception on the public, by sign, representation and advertising for savings accounts, using the prohibited term "saving" or "savings", and in the use of the terms in its dealings with the public, the defendant not only committed a public nuisance but

usurped the rights and franchises reserved exclusively for savings banks and savings and loan associations authorized to do business as such (R. 86). This allegation the defendant denied (R. 86).⁴

The complaint concluded with an allegation that the People had no adequate remedy at law and a prayer for injunctive relief restraining the defendant from advertising or soliciting deposits as a "savings bank" or from using the term "saving" or "savings" or their equivalent in its banking, financial business and dealings with the public in New York. The complaint also contained a general prayer for such other and further relief as might seem proper to the Court (Par. Ninth and Prayer for Relief).

(2)

The answer set up as a complete defense the alleged unconstitutionality of subdivision one of Section 258 (R. 6-7). It alleged that defendant was a national banking association, which, in the course of its general banking business, accepted savings and other time deposits, as well as demand deposits (Par. Ninth); that in carrying on such business, it had placed various signs on its banking premises containing the word "savings" and had, from time to time, advertised the fact that it accepts sav-

⁴ This amendment, incorporating into the complaint the Third paragraph of the People's Bill of Particulars (R. 12-13), did not extend the State's position unduly. The right and franchise referred to is the right to be known as a "savings bank" or as a savings and loan institution. We do not contend that Section 258 accords State-organized savings institutions any monopoly over the receipt of *deposits* of the "savings" type (R. 438). It is our position that the section simply sets up a salutary safeguard, necessary and proper in the opinion of the Legislature, to prevent misleading advertising, calculated or likely to deceive members of the public into believing that an institution, not a mutual savings bank, is such a *bank*.

gs deposits (Tenth); that its activities had been duly approved by the Comptroller of the Currency, the government administrative office charged by Federal statutes with its supervision (Eleventh); that its activities are and have been duly authorized and sanctioned by the Federal statutes relating to national banking associations including, among others, 12 U. S. C. A. Sections 24, 371, 583-585 and 588-a, as well as regulations of the Board of Governors of the Federal Reserve System (Twelfth);⁵ that subdivision one of Section 258 of the New York Banking Law, in so far as it purported to prohibit national banks from accepting savings deposits or making use of the terms "saving" or "savings" is invalid because it: (a) conflicts with the Constitution and the paramount laws of the United States; (b) unduly interferes with and hinders the operation of federal instrumentalities, namely, national banking associations located in New York State and frustrates the purposes for which they were organized; and (c) unduly discriminates against national banking associations located in New York State and handicaps them substantially in competition with savings banks and savings and loan associations (Fourteenth). Accordingly, defendant asked dismissal of the complaint.

The Testimony

The testimony clearly established a violation by the defendant of the provisions of subdivision one of section 258 of the Banking Law. The defendant admitted, by its counsel's opening and by the testimony of its president,

⁵ There is no proof in the record showing that the Comptroller of the Currency had approved *defendant's* activities. Nor has the Federal Reserve Board at any time adopted any *regulation* governing advertising by national banks.

that it had used the words "saving" and "savings" in its banking business, in its signs and in its advertising. The People adduced documentary proof of this usage and photographs of defendant's premises to supplement that proof, showing the way in which defendant used the prohibited words in signs upon its premises.

The defendant sought refuge in testimony disclaiming any *intent* to mislead and offered proof that its premises had been constructed to look like a department store, rather than like any type of bank. And the record was swollen by the testimony offered by the defendant, by way of expert witnesses and a "sample poll", to show that the prohibited words "saving" and "savings" were better understood by residents of Nassau County than the phrases, "compound interest account", "special interest account" and "thrift account", which were generally used by commercial banks (state and federal) to advertise the interest-bearing thrift accounts maintained in such banks.

A. The Conclusive Proof of Defendant's Violation of the Statute.

(1)

At the very outset of the trial, defendant's counsel, after referring to the allegations of the complaint, conceded defendant's violation of section 258. Counsel stated (R. 17-18):

The complaint * * * charges we have used the word 'savings' in, and in connection with our banking business, in or signs and advertising. There is no question about that. We have, we do, and we intend to continue to do so under what we claim is a Federal

grant of power unless and until prevented by action of this or some other Court of competent jurisdiction."

(2)

ARTHUR T. ROTH, president of the defendant, was examined before trial for the purpose of ascertaining the particulars of the defendant's violations of the statute. The People's bill of particulars of the defendant's violations (R. 8-13) was predicated largely upon Roth's testimony. Without objection, Roth's complete testimony was read into the record (R. 21-38).

Mr. Roth admitted the use of the prohibited words, in signs upon the bank's walls and on tellers' windows and identified numerous exhibits showing their use in the period between 1947 and 1950 in various advertising media including newspapers, direct mail, handbills and house-to-house solicitation (R. 22-35).

The defendant not only had a vice-president in charge of advertising and publicity, but it also used an advertising agency (R. 28, 30).

The aggressive nature of defendant's advertising is perhaps best illustrated by its enclosure in 15,000 envelopes, which it mailed, of a form of draft together with instructions for its use, upon which defendant advertised People's Exh. 9K, R. 541):

"We Will Transfer Your Savings Account from Another Bank."

Handbills circulated by defendant solicited "savings" accounts (Exh. 10A, B and C). About 15,000 of these were distributed in June 1948, by the Federal Distributing Corp. in the Franklin Square area (R. 29). The handbills were enclosed in a business reply envelope (Exh. 10A, R. 30) and were in the form of a letter, which offered

special incentives, including "*maximum dividends*"⁶ to persons opening "savings" accounts at the bank prior to a specified date (Exh. 10B); and enclosed therewith was an "application slip" to be filled out by any person who wanted "to take advantage of all the special benefits of a Franklin Square Savings Account" (Exh. 10C). This application form also sought to induce and to facilitate the transfer of accounts from other banks (R. 543).

Defendant distributed about 6,000 copies of its 1948 annual report, in the form of a brochure (People's Exh. 11). In it, defendant advertised, alternately, "savings" and "thrift" accounts. Under the heading of "Savings", it stated that it had "Thrift Accounts"; then it showed a picture of its "New Thrift Wing", which it stated "handled Savings, Christmas Club and Children's Banking". The picture itself showed a sign several feet wide dominating the entire area—containing *not* the words "Thrift Accounts", but the single word "Savings." *Each of six tellers' windows bore a sign with the word "Savings",* above the words "Christmas Club" (R. 556). The brochure also advertised and depicted a special "Children's Savings Window" (R. 560, 562). The defendant's president admitted that the "savings" signs had been on display since about July 1, 1947 (R. 32).

Deposit and withdrawal slips used in the "savings" department since 1947 had borne the designation "savings department" (People's Exhs. 13A and 13B).

ARTHUR SEATON, a bank examiner, testified (R. 38-84). Because it is conceded that the defendant violated the statute, we shall not summarize the portion of his testimony showing defendant's use of the prohibited words.

⁶ National banks are authorized to contract to pay "interest" on deposits, not "dividends". Mutual savings banks pay *dividends*, sometimes colloquially called "interest" (R. 61-62, 287; N. Y. Banking Law, § 245).

Nor shall we summarize the portion of this witness' testimony directed toward showing the defendant's fraudulent *intent*, since it is our position that the New York Legislature and Courts have found that use of the prohibited words by non-savings banks is *per se* deceptive to the public. On that subject, for brevity, we simply call the Court's attention to the portion of the record in which he gave his testimony as to the details of his investigation (R. 38-57).

Except in the defendant's buildings, the witness had, in inspecting 3,000 to 4,000 banks, never seen a commercial bank teller's window with the legend "Savings" (R. 52). Tellers' windows in savings banks uniformly bear that legend (R. 53).

On "cross-examination", Seaton testified that most national banks, in advertising for interest-bearing accounts, used the words "Special Interest Deposits", "Thrift Accounts" and "Compound Interest Accounts" (R. 61). He knew of no prosecution by the State for the use of those terms (R. 67).⁷ Savings banks and savings and loan associations used the words "Savings Accounts" in advertising (R. 61-62).

It was Seaton's opinion that the various phrases used by commercial banks, state and national, had the same value for advertising purposes as the prohibited words (R. 62-63). It will be noted that the bulk of the defendant's testimony was directed toward proving the contrary.

FRANCIS J. LUDEMANN, a Deputy Superintendent of Banks, also testified for the People. His testimony was directed toward showing the various types of banking

⁷ The New York Courts have held that section 258 of the Banking Law does *not* prevent the usage of these synonymous terms commonly employed by national banks to designate their interest-bearing "savings-type" accounts (R. 682, 688-9).

institutions which function in New York, giving some of the history of these various types of institutions and distinguishing between the functions they perform (R. 279-346). These institutions include not only savings banks but commercial banks, savings and loan associations, credit unions and industrial banks (R. 281-286).

We do not believe that we need here detail the numerous differences shown by this witness' testimony between the various types of institutions, in their functions, the limitations upon their powers of investment and their powers to lend money, the maximum amounts of deposits receivable by them, their taxability or in their corporate structure. For present purposes, we believe it to be sufficient to call the Court's attention to the presence of this testimony in the record to offer factual support for the proposition that there are sufficient differences in the nature and functions of these institutions to justify a legislative exercise of discretion directed toward preserving their separate identities. As Mr. Ludemann testified (R. 281):

“ * * * New York has its own pattern of banking institutions, it is not identical with that of other States; it consists in a good part of institutions set up for special objects and restricted in their activities and in the character of assets they can invest in, to those objectives. In the type of financial institutions that take the funds of the public we have three main classes of institutions, we have commercial banks, we have mutual savings banks, we have savings and loan associations * * * .”

He pointed out that savings bank history in New York began in 1819 (R. 284); and that although commercial banks had existed earlier, *it was not until this century that commercial banks had entered the field of “time deposits”* (R. 281-284). He also pointed out that mutual

savings banks were not common throughout the country, existing in only 17 of the 48 states, principally in the New England and Middle Atlantic States (R. 286).

Ludemann also pointed out that Franklin Square, where defendant is located, had no savings banks; but if a *savings* bank had existed there, it could have had no branches, as the defendant had, because it had a population of less than 30,000 (R. 291-292). He conceded that the Banking Department had no formal regulation dealing with the term "equivalent" as used in section 258 of the Banking Law (R. 293-295).⁸ Special Term declined to accept proof from this witness that the Banking Department had *not* considered the use by national and state commercial banks of the terms "special interest account", "thrift account", and "compound interest account" as constituting a basis for prosecution (R. 295-297; cf. R. 301 as to the trade practice of using these terms).

On cross-examination, Mr. Ludemann pointed out that *savings and loan associations* take "investments" as distinguished from "deposits" (those institutions having "shareholders" rather than depositors). Ludemann's testimony indicated that savings and loan institutions *may* be misleading the public in advertising their "shares" as accounts, but he had not been present when a possible prosecution for such advertising had been discussed (R. 306-307). Personally, he did not consider the savings and loan advertising to be deceptive (R. 307). He conceded

⁸ The New York courts have construed the term "equivalent" not to encompass or prohibit the use of the synonymous expressions commonly used by national banks—such as "thrift account", "special interest account" and "compound interest account". We have no authoritative decision on the subject by a New York court, but it is quite possible that the word, as used in the statute, may be restricted to refer only to a *foreign language equivalent* and to words contrived to resemble the prohibited words phonetically or otherwise.

that savings and loan associations advertised higher returns on their shares than savings banks (R. 316-318). He conceded that these associations were, in a sense, in competition with savings banks and commercial banks for people's surplus money (R. 331-332).

Ludemann pointed out more of the distinctions between "passbook" accounts in savings banks and commercial institutions as follows (R. 338):

"* * * in a savings bank you have a mutual institution * * * devoted exclusively really to serving savings accounts in passbook form; that is their one big stock in trade day in and day out, that is really the only public funds they can attract is in that form, and they have no other object, real one, than to keep the funds invested safely and to pay the maximum rate of distributable earnings that can be safely produced. In the commercial bank there is not a similar restriction around the assets to which the funds might be invested, there may or may not be the same continued interest in passbook accounts, and is the possible conflict of interest between the stockholders as between paying the highest rate can be safely produced or a rate they think is necessary to hold that type of business, and you have your background of history and tradition."

B. The Defendant's Case.

The defendant offered two types of proof to show that the words generally used by commercial banks to attract interest-bearing accounts ("special interest," "thrift" and "compound interest" accounts) were not as effective in attracting deposits as the words whose use section 258 prohibited, "saving" and "savings": (1) testimony of several national bank officers thereon; and (2) testimony

as to public understanding of the various terms used in bank advertising, as revealed by a so-called "sample poll".⁹

(1)

JOHN R. EVANS, president of the Poughkeepsie National Bank, competed with no savings banks in his area, where his competition came from five commercial banks and one savings and loan association (R. 99).

Special Term was persuaded by defendant's counsel to admit testimony to support his contention that national banks were seriously harmed because the word "savings" was the "only word" the public seems to understand (R. 102-104), a contention that completely overlooks the function which a well-conducted modern advertising campaign seems to be able to accomplish, even as to artificially contrived words or phrases, in almost any field of business. Special Term permitted the testimony, on the ground that national banks had the power to advertise (R. 103-104), but neglected to observe that the exercise of this power, like the powers of a national bank to make contracts and otherwise conduct its business, was to be exercised in conformity with the laws of the State in which the national bank was located.

Evans' bank used the words "interest accounts," but it was his opinion that the word "savings" had the "most attraction" and that they were "definitely handicapped" by not having the right to use the word (R. 104-105). But, despite this handicap, Evans admitted that accounts in the savings department of his bank had increased in the pre-

⁹ The defendant also offered testimony to show that its main banking structure was altered to look, not like a savings bank, but like a department store; but we shall not summarize that testimony (R. 87-97, Schoen; 114-134, Carlson; 405, Boyle; and 420-434, Roth); since it relates to the issue (now academic) of whether defendant otherwise "solicited or received deposits as a savings bank" and was directed only to elements of proof bearing upon defendant's *intention* to deceive.

ceeding five years from seven to eleven million dollars (R. 105-106); and had yielded a fair return on its capital (R. 106). *During the past ten years, his bank had increased its profits more than three-fold* (R. 111); but he was of the opinion that the profits would have been greater if they had been permitted to use the word "savings" (R. 112).

AUGUSTUS B. WELLER, president of the Meadowbrook National Bank, stated that the competition in Nassau County for deposits was "very intense" (R. 137). There are 49 banks in Nassau County, of which *only one is a savings bank, the Roslyn Savings Bank* (R. 136). Commercial banks, including national banks in Nassau County, compete with banks outside the county for deposits, but the competition is particularly extreme between *commercial banks in the county and savings and loan associations* (R. 139). Most savings and loan associations advertise extensively, but *savings banks not to as great an extent, except New York City savings banks*, which advertise intensively in Nassau (R. 139).

Evans regarded the words "thrift, special interest or compound interest" as "futile in appealing to the public" (R. 140). He thought the word "savings" would attract many more depositors than the words "special interest account" used by his bank (R. 142).

Mr. Weller conceded, on cross examination, that *his bank did not use newspaper advertising*, to solicit special interest accounts, except incidentally, because he deemed it ineffective (R. 144). This admission is very significant, for it is exactly that sort of attitude that probably remains responsible for the public's lack of knowledge of the meaning of the terms used by commercial banks to designate their interest-bearing accounts. Circulars issued to the bank's commercial depositors also contained only incidental references to the "special interest" department (R. 145). Nevertheless, deposits in that department had increased

10% between 1948 and 1950, as compared to 20% in the bank's demand accounts (R. 146).

Mr. Weller also conceded that although his bank had some competition from the Roslyn Savings Bank, the only savings bank among 49 commercial banks in Nassau County, *the bank's real competition came from "New York City banks and savings and loan associations"* (R. 147). He also conceded that *national banks had prospered* during the preceding ten years, although perhaps not as much as savings banks (R. 147); and that in the last 15 years all banks have done well (R. 147). National banks in Nassau County did a very good business from 1945 to 1950 (R. 148).

Mr. Weller conceded that commercial banks made investments prohibited to savings banks (R. 148).

He further admitted that his bank was "a successful national bank" (R. 149); but contended that it would do more business if permitted to use the word "savings" (R. 149).

He further admitted that customers walked out on them and withdrew their deposits when they learned his bank did not really offer depositors a "savings institution" service (R. 152). The embarrassment attendant upon explanations that the national banks' services were "the same thing" is evident in this testimony (R. 152).

"Well, it is rather an awkward thing to explain, just what we do have.¹⁰ Of course, we tell them we have the same thing as the savings department, although it is called a special interest department, we explain to them it is the same thing. When that is not carefully explained to them, however, they seem to feel they are

¹⁰ It would seem quite simple to explain that national banks contract to pay interest to their depositors, at a fixed rate. Indeed, the explanation would seem to be much easier than a mutual savings bank is required to make: That future savings bank dividends can only be estimated.

not doing business with a savings account, and in fact, and we have withdrawals where people explain to us when we ask them why they are withdrawing their money, they decide they need to put the money in a savings institution; that we do not have that type of service."

"The same thing," of course, is exactly what the depositors do not receive, unless New York's constitutional and statutory distinctions between "savings banks" and all other types of banks are to be completely disregarded.

WILLIAM H. ABEL, president of the Central National Bank, testified that the competition for deposits was very keen; particularly since *savings and loan associations* had made vast strides in the preceding ten to twelve years (R. 154-155). He was of the opinion that of the words used *advertising* for deposits, the word "savings" was generally understood by the public, but that the "expressions commonly used in *commercial banks*" were not understood (R. 157).

Mr. Abel declined to state, however, that the expressions commonly used by commercial banks were "inadequate". He explained that the statute put them (*commercial banks*) under a hardship (R. 157). He admitted, on cross examination that between 1930 and 1950, his bank had built up a "savings" deposit business of \$3,000,000, an amount almost equal to the bank's demand deposits of \$3,400,000 (R. 161-162). *He also admitted that the statutory restriction*, even though burdensome, had not impeded the success of his bank (R. 164). Mostly, it was just *embarrassing* to explain their position (R. 164). While his bank had succeeded, savings and loan associations had grown tremendously (R. 165). *He acknowledged that some banks had not advertised for business* (648). About half the commercial banks in Nassau County were state banks, also subject to the statutory restriction (R. 166).

Mr. Abel's bank had conformed to the New York Banking Law provisions and had, nevertheless, made profits (R. 168).

JOHN J. KEUTHEN, president of the Wheatley Hills National Bank, stated he would testify like the preceding witnesses, except that his "savings" department had decreased since 1948 (R. 170). It was stipulated that if the presidents of two other national banks had been called, their opinion evidence would have been the same as that of the testifying witnesses, Abel, Weller and Evans, subject to no concession by the Attorney General as to the accuracy or correctness or admissibility of the opinions so given (R. 170-171).

The Attorney General moved to strike out the opinion evidence of all the national bank officers (R. 170). But Special Term accepted the testimony and attributed great weight to it (R. 657-659). The evidence, however, should have been given the small weight attributed to it by the Appellate Division and the Court of Appeals (R. 681, 688-689). For it is clear on the testimony that the restriction of the New York statute did not prevent any of the national banks affected from carrying on a profitable business.

At worst, New York's statutory regulation subjected them only to the inconvenience of making it clear to the public that they were not "savings banks," within the New York meaning of those words, but a different type of institution empowered under *different conditions* to receive interest-bearing deposits. Furthermore, there was nothing in this testimony to show that national banks had conducted any sort of adequate advertising campaign to educate the public as to the meaning of the expressions they used to designate interest-bearing accounts. On the contrary, the worthlessness of the opinions expressed was demonstrated by the factual evidence that some national banks did not even advertise for business and that others advertised their interest-bearing accounts only incidentally.

(2)

The great bulk of the defendant's testimony was directed toward showing, by means of a "sample poll," paid for by the defendant, that the public better understood the word "savings" than it understood the terms "thrift," "special interest" and "compound interest." The poll purported to test public knowledge and attitudes only in Nassau County, not in the entire State of New York (R. 266). Serious questions were presented as to the admissibility of and the weight to be given to this "sample poll." Special Term resolved all legal questions in favor of the survey and, unlike the Appellate Division and the Court of Appeals (R. 681; 688-689), attributed great significance to it (R. 659-664).¹¹ We shall here cover only certain aspects of this testimony, the significance of which Special Term misunderstood.

The poll was conducted under the supervision of Matthew Chappell, a Hofstra College professor of psychology. He employed students of the college in assembling answers to certain questions which he presented to a "sample" of the Nassau County population. While the evidence indicates that great care was taken to select the interviewees so that they would truly represent the knowledge and attitudes of the entire Nassau County adult population (R. 187-266; 274-277; 388-391; 395-401), there was a "tremendous variety of answers to the questions" (R. 351) and the accuracy of the poll depended upon the analysis of these answers made by a college instructor named Richard Brumbach, the poll's so-called "tabulator," who was permitted to (and did not hesitate to) testify that his "tabulation" was accurate (R. 350). Brumbach, incidentally, admitted that one of the purposes of the survey was

¹¹ See the unsuccessful motion to strike out this evidence, which is incorporated in the record and the authorities cited in support thereof by Assistant Attorney General Rollins (R. 504-528).

to ascertain how far the public had been educated as to the meaning of the four terms used by various banks in advertising (R. 364-365).

The poll made no attempt to test the background of the interviewee's knowledge. Nor did it attempt to ascertain what efforts had been made by commercial banks in the area surveyed to publicize the terms which they used in designating their interest-bearing accounts.¹² It was limited simply to public knowledge and preferences. Of course, those are but two of the factors in which a State legislative committee or a Congressional committee might be interested if it had before it for consideration the question of whether the protection of the public and standards of fair competition required the ban on the use of the words "saving" or "savings" to be continued or discontinued.

But we do not believe that we need here speculate on the various factors, including various types of comparative statistics, which might motivate the State Legislature or Congress to enact a statutory amendment. It would seem sufficient, for the present, to point out that a Court could not properly or effectively function in that legislative capacity.

The results of the survey, in any event, sustain the constitutionality of section 258, rather than the conclusion reached by Special Term. For while the survey showed that the public had a greater understanding of the mean-

¹² No part of the survey was designed to test the effectiveness which a sustained modern advertising campaign would have in increasing the public's knowledge of the meaning of the terms ordinarily used by commercial banks—"special interest", "compound interest", "thrift." Defendant's witness, Brumbach, conceded that an advertising campaign could so educate the public (R. 370-371). Defendant's president made a similar admission (R. 489). And it should be remembered that the defendant was astute enough to have a vice-president in charge of *advertising* (R. 28, 407, *et seq.*).

ing of the word "savings" than it did of the terms used by commercial banks (R. 626), it also showed a public preference for using savings banks for the maintenance of "interest"-bearing accounts (R. 637-639). And, just as important, *it showed a widespread lack of knowledge on the part of the public as to the type of financial institutions which maintained the various types of "interest"-bearing accounts* (R. 629-630). The survey demonstrate that even today, many years after the enactment of section 258, a sufficient degree of public ignorance persists, so that New York's Legislature would be justified in now enacting legislation to protect this ill-informed public from a misleading use of the terms "saving" or "savings."

Indeed, the defendant, by its survey seems to have supplied evidentiary material in support of the New York Legislature's action, which would seem to render it unnecessary, since the evidence was accepted, to rest on the usual presumption that a factual basis exists for legislative action. Certainly, the evidence adduced by the defendant as to one phase of public ignorance would seem to warrant the assumption that the use of the word "savings" might mislead many of these ill-informed persons into assuming that a bank using the word was surrounded by all the statutory safeguards ordinarily associated in New York with mutual savings banks.

(3)

The defendant's own financial status belies its claim that section 258 has impaired its effectiveness. Even before 1947, when it began to violate section 258, defendant's deposits and assets had grown tremendously. Its total deposits grew from \$490,264 in December, 1933, to \$20,024,644 in December, 1945. Its "capital, surplus and undivided profits" grew from \$123,437 in 1933 to \$1,091,066 in 1945 (People's Exh. 36, R. 602A).

Defendant's interest-bearing deposits grew from \$274,601 in 1941 to \$10,085,748 in 1946, during a period when, presumably, it was observing the provisions of section 258 (R. 649).¹³

(4)

Over objection, Special Term received in evidence a Treasury Department form on which the defendant was required to report its financial condition to the Comptroller of the Currency (R. 458-462; Exh. PP, R. 652A). The form contains a single item for "Interest on time deposits (including savings deposits)." New York does not suggest that section 258 prevents the defendant from preparing such a report. And the New York Appellate Division and Court of Appeals have held that section 258 is addressed to a bank's advertising to the *public* (R. 679, 4).

Nor do we suggest that defendant is prevented from selling or redeeming United States "savings" bonds, or advertising their sale (R. 344-345). Exhibits QQ, RR and S, which deal with the advertising of government bonds which national banks are required to sell, as government agents (31 U. S. C. A., § 757c, subds. h and i and U. S. Treasury Regulations §§ 316.20d, 321.1, among others), could have been excluded from evidence (R. 466, 469, 50). In any event, the New York statute has not been construed to prevent the conduct of such *government business* (R. 682).

¹³ Prior to the commencement of this suit, the defendant in 1950 added three branches to its main bank—one at Elmont, another at Levittown and the third at Rockville Centre; the last by merging with a state bank that had been the South Shore Trust Company of Rockville Centre (R. 433-435). We need not here speculate on the extent of the impetus given to defendant's growth by its misleading use of the term "savings" at its main office since 1947 and at its branches thereafter; nor upon the reason why in 1949 and 1950, after defendant had commenced its violation of the statute, its *demand* deposits began to exceed its "savings" deposits (R. 436, 649).

Analysis of the Opinions of the New York Courts

A. The Special Term Opinion.

Mr. Justice Cuff's opinion reveals two major misapprehensions. First, he assumed that it was essential to the People's case that it be shown that the defendant had *intentionally* built its bank in such a way and conducted its business in such a way as to show a *fraudulent purpose* to mislead the public. He overlooked the finding, implicit in section 258 of the Banking Law, that the use by any bank, other than a savings bank, of the words "saving" or "savings", would tend to mislead the public. Justice Cuff, in dealing with a police power statute, disregarded the legislative purpose and exonerated the defendant from responsibility for the obvious consequences of its business and advertising policies on the very narrow finding that an actual *fraudulent purpose* had not been shown. We question the correctness of this finding, since, as the Appellate Division and Court of Appeals have found, defendant deliberately violated the statutory prohibition (R. 679, 685), without regard to the *effect* of its violation; and in view of the fundamental legislative objective of protecting the public from misleading advertising.

Special Term not only failed to show a comprehension of the Legislature's purpose. It misapplied the supremacy doctrine, invalidating our New York statute when Congress had not even entered the particular legislative field embraced by our statute—that of protecting potential mutual savings bank depositors from misleading advertising. Special Term did not even note that the federal government had not entered that particular field. Nor did it note that Congress had, at no time, clearly or explicitly authorized national banks to use the prohibited words in their advertising.

These major errors in Special Term's reasoning are demonstrated in various statements contained in its opinion. We shall discuss them insofar as they are pertinent to the disposition of this appeal.

1. How Special Term Disregarded Respondent's Misleading Use of the Words "Saving" and "Savings."

(A)

Special Term stated that the issue at bar was "not one of wrongdoing" (R. 656); but simply one of power to legislate with relation to national banks (R. 656). But it failed to grasp that the power exercised by the Legislature was a *power to prevent wrongdoing* and that such power had been exercised *without any discrimination* against national banks.

Special Term failed to realize, apparently, that the particular sort of "wrongdoing" which the Legislature sought to prevent was the use by any bank (as well as other organizations and persons) of the words "saving" or "savings", so that potential depositors would be *misled* into believing that they were dealing with savings banks. Special Term's exculpation of the defendant as a *wrongdoer*, in effect, permitted the use of words found by the Legislature to be misleading, without regard to the *natural consequences* of the use of the misleading words.

Special Term commented upon the State's failure to submit "proof of intent to deceive" (R. 657), but did not perceive that it was obliged by the terms of the statute, to find that the defendant's admitted use of the words "saving" and "savings" was misleading and deceptive. It made no such finding. It disregarded the legislative finding; and, instead, accepted as true the defendant's

protestation of an innocent purpose (R. 657).¹⁴ In accepting the defendant's protestation of innocence, Special Term attributed no significance to the fact, which it noted elsewhere, that, whereas other national banks (as well as state commercial banks) refrained from using the terms "saving" and "savings" in their business, the defendant had, since 1947, used the prohibited words in order to secure to itself the unfair competitive advantage of those words (R. 657-658). We do not believe that Special Term was compelled to be so naive as to assume that the defendant sought the competitive advantage of these words without having undertaken the risk of being misunderstood in their use and of misleading careless, gullible or ignorant members of the public into believing it was a savings bank.

After having stated very early in its opinion: "I have disposed of the fraud angle of this litigation; it will not again be referred to" (R. 657), Special Term found it necessary, toward the end of its opinion, to pronounce: "The element of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto" (R. 667).¹⁵

¹⁴ Cf. *Radio Officers' Union v. Labor Board* U.S. decided Feb. 1, 1954, dealing with an Act of Congress which this Court held dispensed with the necessity of supplying specific evidence of intent, and which applied the common law rule that "a man is held to intend the foreseeable consequences of his conduct." See also *Pereira v. U. S.* U.S. decided the same day, applying the same rule of reasonable foreseeability to a problem of causation.

¹⁵ The Court of Appeals has sustained Special Term only to the extent that it has concluded that there is no basis in the record for finding that the defendant violated the portion of Section 258 which prohibits "soliciting or receiving deposits as a savings bank" (R. 685). In substance, the Court of Appeals has found: that the bank "violated so much of Section 258 * * * as prohibits the use of the two words 'saving' and 'savings'"; and that it has not otherwise solicited or received deposits as a savings bank.

It is clear, therefore, that Special Term remained concerned solely with the defendant's *intent* and failed to give effect to the Legislature's purpose to protect the public against a misleading type of advertising. The focus of Special Term's misdirected attention is, perhaps, best illustrated by these two sentences in its opinion (R. 657):

"The proof offered by plaintiff need not be detailed, because defendant admits all of the facts upon which plaintiff rests its case. It challenges only the motives ascribed by plaintiff that defendant sought to represent itself as a savings bank."

After so stating, Special Term proceeded to fall victim to the defendant's assertions of "good faith" in using the prohibited words.

(B)

Having stepped off in the wrong direction, Special Term continued to ignore the warning signs contained even in the proof offered by the defendant in support of its defense.¹⁶ Most of this proof was offered to show that the defendant and other national banks were being hampered by their inability to use the prohibited words. We shall discuss later the failure of this proof to meet the standards of constitutional doctrine (*infra*, pp. 51-104). For the moment, we note simply that Special Term failed to observe that the defendant's own evidence demon-

¹⁶ Special Term's somewhat careless treatment of this testimony is revealed, in part, by its statement that several national bank officers had testified that "deposits in national banks were of two types—demand and savings" (R. 657). Actually, the testimony indicated that the basic distinction is between "demand" and "time deposits", the latter category of deposits being one that includes "savings" deposits (R. 481). Moreover, these two types of deposits are maintained not only in national banks, but in other types of commercial banks.

strated that a factual basis existed for the Legislature's finding that the use of the prohibited words would mislead the public.

(C)

The substance of the testimony of several bank officers and the conclusion demonstrated by defendant's "sample poll" was that the terms "saving" and "savings" were better understood by the public than the terms which were generally used by commercial banks, including national banks, such as "thrift", "compound interest" and "special interest" accounts (R. 657, et seq.). Special Term stated (R. 659-660):

"Defendant also introduced evidence concerning a sample poll to show the public understanding of the following terms: 'savings', 'thrift', 'compound interest' and 'special interest' as they relate to bank accounts (278). The object of the defense in introducing this evidence was to demonstrate that the term 'savings account' is well understood by the public; that when disposed to open a bank account, the public reacts to the power of suggestion which the word 'savings' generates and turns to the savings bank with its business; that the three terms which defendant and other national banks are forced in their publicity to substitute for 'savings' are not well understood and do not attract depositors in anything like the numbers that the word 'savings' does."

That the public understanding of the words "savings accounts" had been developed in New York over more than a century of doing business with savings banks (R. 284) was a fact which Special Term did not see fit to note. Nor did Special Term seem to observe the significance, as a basis for legislative action, of the culture pattern which had developed in New York—that "the public reacts to the power of suggestion which the word 'savings' gener-

ates and turns to a savings bank with its business" (R. 660).

Nor did Special Term seem to comprehend that the defendant was simply confessing that, up to the date of its survey, *commercial* banks generally had *not* effectively educated the public as to the significance of the terms which they had been using to attract *interest-bearing deposits*.

(D)

In one portion of its opinion, Special Term appeared to be showing some respect for New York's legislative wisdom in maintaining a separate category of banks, known as savings banks (R. 664-665). Then, in complete defiance of the mandate of the New York State Constitution and *usurping the function of the Legislature*, it questioned whether any special legislation protecting savings bank depositors was any longer necessary, since the federal Government now insured deposits in all banks (R. 664).

Before revealing its tendency to become legislative, Special Term had recognized (R. 664):

"There is a difference between savings banks and commercial banks, including national banks (Bank of Redemption v. Boston, 125 U. S. 60). The savings bank has no stockholders. It is owned, if owned at all, by the depositors; total amount that each depositor may deposit is limited; its officers are their employees whom they appoint to receive and invest their deposits which are to be returned to them with the earned interest upon reasonable demand. There are no profits, as such. Profits, if any, ultimately are returned to the depositors in the form of interest [sic]. The investments made by their officers are circumscribed. They may make no commercial loans (loans on unsecured notes or notes secured by personal

property other than 'legal investments'); the amounts of their mortgage loans on realty are surrounded by statutory restrictions referable to the appraised value of the pledged realty, its location, the nature and age of the improvement thereon, amortization arrangements, duration of loan and stability of borrower (Sec. 235) (6), N. Y. Banking Law)."

Special Term also noted (R. 664):

"The commercial (national) bank is owned by its stockholders. Its officers are the employees of the board of directors, who in turn are the elected representatives of the stock. Those officers are expected, in managing the bank, to produce profits, which go to the stockholders in the form of ordinary dividends. A commercial bank may make, in the exercise of the sound judgment of its officers, unsecured loans and loans secured by personality, which may even be merchandise. There is no limit upon the total amount it may receive from each depositor. It may provide money on mortgage loans like the savings bank based upon the appraised value of the pledged realty, but there are not the other rigid restrictions which are imposed upon savings banks (12 U. S. C. A. 371). *While national banks receive and record their savings deposits separately from their demand deposits, both are pooled and provide one working fund. Thus savings deposits control as much as demand deposits, the volume of lending and investing in which national banks indulge.*" (Italics supplied.)

And Special Term wrote (R. 665):

"It has been said that the savings bank is a semi-public institution; that the state in its wisdom seeks to encourage those who will save, particularly in small amounts; that the state has furnished a haven

for the thrifty. I do not wish to cast the slightest reflection upon commercial banks and their stability when I say that the legislation with respect to savings banks enacted by this state over the years was unmistakably intended to render the savings bank as safe and sound as laws could, to the end that those small depositors, encouraged as I have said to save, would run the least possible risk of losing their funds, and, incidentally, would receive as much interest [sic] as safety would permit. The power and discretion of the officers of savings banks are indeed narrow and circumscribed."

Even more specifically, Special Term observed (R. 665):

"The New York State legislatures, enacting laws from time to time, were always seeking to protect deposits in savings banks, it would seem solely for the benefit of the depositors, to assure each depositor as far as laws could assure, that his or her deposit would always be available upon reasonable demand."

Nevertheless, Special Term, substituting its judgment for that of the Legislature and completely disregarding the New York Legislature's efforts to preserve the separate identity of "savings banks" suggested that *state protection of depositors was no longer necessary* since the federal government now offered all depositors an insurance policy against all losses (R. 665). Special Term might just as well have suggested that *all protection of savings and other deposits by state regulation* completely cease and that the identity of savings banks be obliterated since the federal government had taken over as an insurer.

(E)

How completely Mr. Justice Cuff was led astray by the defendant is apparent from his statement of the purpose

of this suit. He stated that "by this suit the state seeks to judicially eject from those fields [of banking business] an important cog in that system, albeit a creature of the United States Government—the national bank" (R. 666).

New York's purpose is not to exclude national banks or even state commercial banks from the field of receiving interest-bearing deposits. Its purpose by this suit and by the enactment of section 258 is to prevent the defendant from using misleading advertising and to prevent it even in "good faith" from using words that may have the effect of holding itself out as a bank of the type organized under Article 6 of the Banking Law—known commonly to the public in New York as a "savings bank".

2. Special Term's Misapplication of the Supremacy Doctrine.

Special Term's test of the constitutionality of section 258 was whether it could be harmonized with "section 371" (actually section 24) of the Federal Reserve Act. Justice Cuff incorrectly concluded that the two sections "could not be read together in harmony" (R. 666). It was his opinion that there was a "violent conflict of legislative authority" (R. 666). In coming to that conclusion, he failed to construe either section correctly. He erroneously assumed that the New York Legislature sought to eject national banks from the field of banking relating to savings deposits and to create a monopoly¹⁷ in favor of savings banks (R. 665-666) and he gave to "section 371" of the Federal Reserve Act an interpretation not warranted by the terms of the federal statute (R. 671-672). The result of Justice Cuff's opinion was that the defendant was permitted to engage in a type of misleading advertising, not authorized by Congressional act and specifically prohibited to State as well as national banks by our statute.

¹⁷ Cf. *Roschen v. Ward*, 279 U.S. 337, 339-340.

(A)

Special Term correctly recognized that it was necessary, prior to holding New York's statute unconstitutional, to find that it conflicted with a congressional enactment; and the necessity of finding that section 258 impaired the operation of a federal instrumentality. But, as we shall show, Special Term completely ignored the entire trend of recent constitutional decisions which is to interpret federal and state statute so that they may operate without conflict. Furthermore, it disregarded controlling decisions by this Court holding that: nondiscriminatory statutes, applicable to the operations of national banks as well as state institutions, are constitutional; and that every regulation that affects national banks in an economically disadvantageous manner does not come within the constitutional prohibition against hampering Congressional objectives.

(B)

In interpreting the New York statute, Justice Cuff divided the section into three artificial "parts", but failed to read it as a whole or take into consideration its legislative history (R. 666-668). The third "part" of subdivision 1 of section 258, Special Term stated, "forbids national banks 'in any way (to) solicit or receive deposits as a savings bank'" (R. 666).

Actually, the statutory prohibition is not directed against "national banks" alone, but against "any bank, trust company, national bank, individual, partnership, incorporated association or corporation other than a savings bank or a savings and loan association". And nowhere in its discussion of the meaning of this section did Special Term note the fact that the term "savings bank", is defined in section 2 of the Banking Law to mean a "corporation organized under and subject to the provisions of

article six'' of the Banking Law. Special Term, as a result, slipped into this reasoning (R. 666-667):

"I will discuss the third part first. *A national bank is not a savings bank.* Nevertheless, Congress has granted it the power to solicit and receive 'savings deposits' (Sec. 371, *supra*). Obviously any national bank (the defendant is one) availing itself of that power, will provide space and facilities within its walls where such deposits may be made by the public and be received by the bank. That particular part of the bank of necessity will give off an air of sanctuary where savings are to be banked. To that extent the national bank would assume some of the attributes typical of an institution where savings are ordinarily deposited. I cannot perceive how such a situation could be avoided, if the national bank is to receive 'savings deposits'. Could it be that the authors of Section 258 (1) of the New York Banking Law intended to render that inevitable situation a violation of that law and to subject the national bank which, perforce gave it expression to the prescribed penalties? The provision 'nor shall' a national bank in any way solicit or receive deposits as a savings bank' (Sec. 258 (1) *supra*), I consider refers to a national bank simulating a New York savings bank for purposes of deception (*People v. Binghampton Trust Co.*, 139 N. Y. 185 190). The elements of deception abhors this litigation, because as I have pointed out above, there was a complete failure of proof in plaintiff's case with respect thereto. Therefore, the 'third' part of Sec. 258 (1) may be disregarded." (Italics supplied.)

In so reasoning, Special Term failed to perceive that the prohibition was directed against *misleading* the public, in the solicitation or receipt of deposits into believing that *any institution* which had not been organized under the provisions of Article 6 of the Banking Law had been so

organized. And by confusing its discussion of Section 258 with a statement of the powers of a national bank to "receive * * * savings deposits" (Special Term states: "solicit and receive", (R. 666), Justice Cuff found himself unable to "perceive" how a national bank, exercising its power to receive savings deposits, could avoid misleading its depositors into believing it was a "savings bank" within the meaning of the New York statute (R. 667). As to this third "part" of the New York statute Special Term concluded that it was essential to show "purposes of deception", an element which is found missing from this litigation.¹⁵

After having separately read the "third part" of subdivision one of Section 258, Special Term noted that the "first" and "second" parts were "different" and might be considered together (R. 667). The "difference", it may be assumed, is that as to these subdivisions, Special Term concluded that it was unnecessary to show an *intent* to deceive. Had Special Term correctly read the statute, it would have understood that the Legislature had concluded that the use by a bank other than a savings bank of the words "saving" or "savings" in its banking or financial business, or in any of its advertising "in relation to" such business, were specific types of conduct *likely to mislead* the public into believing that it was a "savings bank".

Had Special Term kept in mind the legislative purpose to protect the *public*, it would not have strained as it did to construe the statute literally to prohibit national banks from using the word "savings" in any of its accounting records or in its form of reports to the federal comptroller of the currency (R. 668). The obvious purpose of the statute was to govern a bank's business relations with

¹⁵ The defendant has not been found by the New York courts to have violated this part of the statutory provision. See 305 N. Y. 53, 458.

the public, not its compliance with federal regulations specifying a detail of a required report as to its financial status. We do not believe that Special Term was justified in resorting to this extreme construction in order to reach the conclusion that the Legislature had erected an unconstitutional safeguard.

(C)

In construing "section 371" of the Federal Reserve Act, Justice Cuff assumed that the power granted to national banks to "receive savings deposits" carried with it as an incidental power a completely unrestricted right to use the word "savings" in any way in its business or its advertising (R. 670). We believe that this was a gross error. It is not essential to the business of national banks that they engage in misleading advertising.

Special Term sought to reinforce its implication of the power of national banks to use the word "savings" by pointing out that power of such banks to "receive savings deposits" had been added by an amendment to the federal statute after the statute had already included the power to receive "time deposits". It stated that "some controversy" had arisen concerning the right of a national bank to advertise and use the word "savings" which had in 1915 been resolved (!) in favor of the national banks by the "administrative branch" of the federal government; and that the inclusion in the federal statutory powers of the right to "receive savings deposits" was "intended to legislatively put that dispute at rest" (R. 671). For the moment, we need comment only that there is nothing in the federal statute (and nothing has been shown by way of congressional debate or committee report) to show any congressional intent to settle any *such* dispute or to divest the several states of their power to prevent misleading advertising. As we shall show, Special Term attributed to Congress a purpose not evident in the terms of the federal statute (*infra*, pp. 86-96).

(D)

Having misconstrued both Section 258 of the Banking Law and the purpose of Section 371 of the Banking Law, Justice Cuff then disappplied the supremacy doctrine. He found a conflict of federal and state law where none existed.

Without noting that misleading advertising by *any* bank might constitutionally be deemed an *improper* means of attracting business, Justice Cuff stated (R. 669):

“To deny to defendant the right to invite the public by all *proper* means of expression at its disposal, to make ‘savings deposits’ with it, is to curtail the power to receive such accounts, to reduce its effectiveness as an agency handling that kind of *financing*—in short, to defeat one of the main purposes for which it was created by Congress.” (Italics supplied.)

Special Term then (R. 669-670) cited as examples of cases in which state legislation had been held to interfere with federal instrumentalities *McCulloch v. Maryland*, 4 Wheat. 316; *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U. S. 17; *First National Bank v. California*, 262 U. S. 366; *Easton v. Iowa*, 188 U. S. 220; and *Fidelity National Bank & Trust Co. v. Enright*, 264 F. 236. We shall show these cases to be distinguishable as not involving statutes like that in the case at bar (pp. 104-118). We shall also cite many cases in which *police* power measures like that here involved have been sustained as constitutional (pp. 51-55).

Strangely enough, Justice Cuff recognized that (R. 670):

“There is no doubt that creatures of the Congress are subject to states’ police powers enacted into law (*Engel v. O’Malley*, 219 U. S. 128; 31 S. Ct. 190; 55 L. Ed. 128, affirming 182 Fed. 365).”

But due to his complete failure to appreciate the nature of Section 258, he continued (R. 670):

“but the law which accordingly subjects them should be an exercise of a real police power.”

And the basis upon which he concluded that Section 258 could not be deemed to be a police power statute, he stated as follows (R. 670):

“The facts and law deny that contention in this situation because deposits (up to \$10,000) in national banks are insured federally the same as savings banks' deposits are insured (up to \$10,000). I must hold that Section 258 (1) is not that type of law.”

We believe that the foregoing discussion sets forth the substance of and the major points of error in Special Term's opinion.

B. The Appellate Division Opinions

(1)

The Appellate Division reversed Special Term and directed that the defendant be restrained from advertising or otherwise using the word “saving” or “savings” in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank (R. 679).

In its opinion, it emphasized the distinctive character which “savings banks” had during the previous century acquired in New York (R. 679); and held that the Legislature was entitled to find that, in the course of time, the word “saving” or “savings” had become so associated with savings banks that if used by another kind of bank, people were apt to be misled into thinking it to be a mutual savings bank (R. 679-680).

Contrary to Special Term, the Appellate Division held that Section 258 of the Banking Law was an appropriate exercise of the police power, aimed at preventing the deception of the public, innocently or intentionally (R. 680). It rejected Special Term's theory that the establishment of the Federal Deposit Insurance Corporation had eliminated the need for this exercise of the police power, not only because Federal Deposit Insurance Corporation offered only a limited type of protection, but also because its establishment "in no way prevents the public from being misled, to which protection it is entitled" (R. 680-681).

The Appellate Division further concluded that Section 258 was "not in conflict with federal law" (R. 681). After noting that national banks are limited to powers conferred by Congress, the Court wrote (R. 681):

"It is conceded that the provision of the Federal Reserve Act relied upon by respondent (U. S. Code, title 12, sec. 371), does not expressly confer upon such banks the right to use the words 'saving' or 'savings' in their dealings with the public; and since both the state and federal statutes can consistently stand together it may not be implied that when Congress authorized national banks to 'continue * * * to receive * * * savings deposits' it intended thereby to supersede the state statute prohibiting them from advertising in a manner found to be misleading by the State Legislature (citing cases)."

Next, the Appellate Division found that the proof offered by the defendant failed to show that Section 258 unduly interfered with the operation of federal instrumentalities (R. 681). It rejected the defendant's contention that the statute was a "crippling obstruction" (R. 681). It pointed out that police power regulations are valid even when they impose some burdens on the national government itself, of the same kind as those im-

posed on citizens within the state's borders. It observed that a state's police power regulations are not to be deemed improper "solely because it places some burden on *national banks*" (R. 681-682).

The Appellate Division rejected defendant's contention that the statute was discriminatory (R. 682):

"for by its terms it applies equally to all commercial banks, state-chartered as well as nationally-chartered."

In sustaining the validity of Section 258, the Appellate Division declined to have imposed upon it the rigid construction of the statute which the defendant demanded (R. 682). It held that the section did not forbid the use of the expressions ("special interest" accounts, "compound interest accounts" and "thrift accounts") whose use the State Banking Department has not sought to restrain (R. 682). And it further held that the statute was not to be construed to prohibit the publicizing of United States Savings Bonds in furtherance of government business nor to encompass reports by national banks to government departments (R. 682).

(2)

Presiding Justice Nolan filed a brief dissent (R. 682-683). He agreed with the majority that (R. 682):

"the state has the power to protect the public, by preventing national banks from purporting to act as savings banks and even from using the word 'savings' in a manner which might deceive depositors in that respect."

But he held Section 258 of the Banking Law to be "in conflict" with Section 24 of the Federal Reserve Act (12 U. S. C. A., §371) "in so far as it *forbids* the use of the

word 'savings' " (R. 682). He suggested that the State accomplish its purpose, instead, "by regulation", rather than by a prohibition which would prevent even a verbatim statement of the federal law specifically permitting national banks to "receive" *savings* deposits (R. 683).

In other words, Justice Nolan agreed with the State's position that the State's power to prevent misleading representations extended even to national banks: but he would have chosen a different method from that used by the Legislature to protect the New York savings public. Apart from the fact that it remains the New York Legislature's function to make such a choice of methods, Judge Nolan's dissent seems to overlook the fact that Congress has not explicitly exercised whatever power it may have to permit national banks to use in their advertising, words theretofore prohibited by State statutes. In so far as Congressional reports and debates are available, they do not show that until now Congress, after appropriate investigation and study, has weighed the risk of public deception and damage in a State which has built up special savings bank safeguards against the inconvenience occasioned to national banks of preventing them, along with other non-savings banks, from using words which a State Legislature has found to be deceptive.

The Court of Appeals Opinions

(1)

The undisputed evidence, the Court found, showed that the defendant had, since 1947, violated New York's prohibition against the use of the words "saving" and "savings" in the advertising and conduct of its banking business (R. 685). It sustained the Appellate Division judgment to the extent it prohibited such violation. But it found no evidence that the bank had violated the prohibition of the statute against "soliciting or receiving de-

posits as a savings bank." Accordingly, it struck out so much of the injunction prohibiting violation of that provision, as "unwarranted" (R. 685).

The Court then stated the real question before it to be whether the statute unconstitutionally contravened any controlling and overriding federal statutory provision on the same subject or interfered with the operations of a national bank (R. 685). As to the respective roles which the federal government and the several states play, generally, in regulating national banks, the Court recognized that (R. 686):

"Under section 8 of article I of the Federal Constitution, Congress has power to, and does, incorporate national banks and has the paramount power of regulating them; any applicable Federal laws are supreme in the field; national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not interfere with the functioning of the banks, and which do not contravene Federal laws (citing numerous cases)."

The court then rejected the bank's contention that Congress had, by expressly authorizing national banks to receive "savings deposits", inferentially licensed them to advertise the provision of such banking services in words which were forbidden by New York laws (R. 686-687). It noted that New York law did not prevent the defendant from carrying on a particular type of business, but did forbid a misleading description of that business (R. 687). It pointed out (R. 687-688):

“ * * * while the Federal statute prescribes the kind of business that national banks may carry on, the State statute, to avoid deception of our people, interdicts the use, in that Federally-prescribed business, of certain nonessential words, and there is no Federal statute relating to the use of those words, as such. Congress, while interested in protecting its creatures, the national banks, in the use of their proper powers, has no interest in their use of deceptive verbiage.”

On the question of whether the New York statute unduly impeded national banks in carrying out their lawful purposes, the Court of Appeals concluded that (R. 689):

“the legitimate national banking activity, of taking and advertising for interest accounts, is not substantially interfered with by the State’s prohibition of the use of misleading words.”

In this connection, the Court deemed it significant that the record showed that national banks operating in New York had carried on their business of receiving this type of deposit by the use, in their advertising and elsewhere, of such synonymous expressions as “special interest account”, “thrift account” and “compound interest account” (R. 688-689). Insofar as the record presented a question of fact as to the substantiality of that interference, the Court found that (R. 689):

“ * * * the weight of evidence confirms the finding of the Appellate Division that the number of accounts of the ‘savings type’ has increased greatly in those national banks in the State which have obeyed subdivision 1 of section 258, and that those national banks ‘have enjoyed continued prosperity notwithstanding said statute’ (281 App. Div. 757, 758).”

The two dissenting judges concluded that New York's prohibitory language conflicted with the Congressional provision authorizing national banks to receive "savings deposits" and to pay interest thereon (R. 690). They were of the opinion that the right to accept "savings deposits" and maintain "savings accounts" (a term not referred to in the federal statute) could mean very little, (a conclusion belied by the evidence showing the very substantial business built up in New York by national banks in passbook-evidenced interest-bearing accounts) if the bank must hide that fact or announce it in terms that fail to make it clear (R. 690).

The minority opinion disregarded the fact that New York makes no claim that national banks should hide the fact that they are empowered to receive passbook-evidenced *interest-bearing accounts*. And on the subject of "clarity", the minority overlooked the fact that all New York seeks is that national banks shall make it "clear" by the use of non-misleading words that the interest-bearing accounts they are authorized to receive are not "the same thing" as savings accounts in savings banks. *Clarity* in advertising is what New York seeks to preserve by preventing the confusing use of a single set of words to describe two different things. We do not believe, to use the analogy of the dissenters, that under the guise of "watering or cultivation" to produce vegetables (e.g., advertising their power to receive deposits) national banks should be permitted to designate the product that is being grown in such a way as to make it appear that the vegetable which they are cultivating (Vegetable "B"), an interest-bearing account in a commercial bank empowered to make unsecured loans, etc., is really another vegetable (Vegetable "A"), a dividend paying account in a differently regulated type of bank, a mutual savings bank.

The dissenting judges incorrectly concluded, as had Special Term, that national banking activities were unconstitutionally hampered, upon the assumption that the statute denied to defendant "the right to invite the public by all proper means of expression at its disposal to make savings deposits' with it" (R. 690-691). They failed to note that a misleading use of terms in advertising could constitutionally be deemed "improper"; and that it was incorrect to *assume* or *infer* such usage to be "proper."

POINT I

Section 258 of the New York Banking Law, prohibiting banks other than savings banks from using the words "saving" and "savings," constitutes a proper exercise of the New York's police power. It is designed to protect the public from the consequences of its own ignorance and carelessness as well as from intentional misrepresentation in identifying as "savings banks" institutions which do not have all the safeguards of New York's "savings banks."

A. The police power is available to protect the public from the consequences of its own ignorance and carelessness as well as from deliberate fraud. The prohibition of the use of misleading terms is a proper exercise of the police power.

(1)

Banking business and banking practices may be regulated by the various states under their police powers. *Engel v. O'Malley*, 219 U. S. 128; *Assaria State Bank v. Dolley*, 219 U. S. 121; *Schallenberger v. First State Bank*, 219 U. S. 104; *Nobel v. Haskell*, 219 U. S. 104, 110-113. See also *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80, 82, where this Court noted the great scope of the police power and *Walsburg v. Maryland*, 328 U. S. , decided January 11, 1945, observing that the "presumption of reasonableness" of police power legislation "is with the State."

The police power may be exercised to protect the ignorant and rash from the consequences of their own folly. *Dillingham v. McLaughlin*, 264 U. S. 370, 374. A State may in the exercise of this power afford protection against ignorance, incapacity and imposition. *Dent v. West Virginia*, 129 U. S. 114, 122; *Plumley v. Massachusetts*, 155 U. S. 461, 471-472, 478-479; *Crossman v. Lurman*, 171 N. Y. 329, aff'd 192 U. S. 189; and *Graves v. Minnesota*, 272 U. S. 425, 427.

Measures by the States, designed to prevent deception and confusion have been held to be within the proper scope of their police powers. See *Sage Stores Co. v. Kansas*, 323 U. S. 32, sustaining Kansas legislation against "filled milk."¹⁰ See also *Hebe Co. v. Shaw*, 248 U. S. 297, sustaining a prohibition enacted by Ohio against the sale of condensed milk made otherwise than from whole milk as a proper exercise of legislative power to protect the public against fraudulent substitution. See also *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204, holding that it was within the police power of the State of Mississippi to include within the prohibition of the sale of intoxicating liquors, the sale of malt and other liquors sold under the guise of innocent beverages.

State legislation designed to prevent the deception of the public in the sale of stocks and other securities has been

¹⁰ In *Carlene Products Co. v. United States*, 323 U. S. 18, considering the constitutionality of a similar Act of Congress prohibiting the manufacture, sale or shipment of "filled milk," the Court stated (p. 23):

"The possibility and actuality of confusion, deception and substitution was appraised by Congress. The prevention of such practices or dangers through control of shipments in interstate commerce is within the power of Congress."

upheld against challenges that such regulation "burdened" interstate commerce. See *Hall v. Geiger-Jones*, 242 U. S. 539 (1916). See also *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, where this Court sustained the constitutionality of a law prohibiting the offering for sale as "Ice Cream" of any article not containing butter fat in reasonable proportion, as being within the police power. And see *Powell v. Pennsylvania*, 127 U. S. 678, where this Court sustained a statute prohibiting the manufacture of oleo-margarine and held that the Fourteenth Amendment was not designed to interfere with the exercise by the States of their police power for the protection of health, *the prevention of fraud* and the preservation of public morals. See also the *Trading Stamp Cases*, *Rast v. Deman & Lewis*, 240 U. S. 342, *et seq.*; *Merchants Exchange v. Missouri*, 248 U. S. 365; *Schmidinger v. Chicago*, 226 U. S. 578; *Otis v. Parker*, 187 U. S. 606, 609; *Biddles, Inc. v. Enright*, 239 N. Y. 354.

(3)

The States may prohibit misleading advertising in the exercise of their police power. *Semler v. Dental Examiners*, 294 U. S. 608, 611. In that case, Chief Justice HUGHES met in this fashion a contention that a statute *restricting* the power of dentists to advertise prevented truthful advertising (294 U. S. 608, 612):

"the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."²⁰

²⁰ New York has stated that its public policy as to its own institutions is (New York Banking Law, § 10):

"to eliminate unsound and destructive competition among such banking organizations and thus to maintain public confidence in such business and protect the public interest and the interests of depositors, creditors, shareholders and stockholders."

Thus the States have the power not only to prevent misleading advertising, but in certain situations, including those where the States exercise their power to regulate the conduct of the various professions, they have the power completely to prohibit any advertising at all for patronage. *Pollock v. Board of Regents*, 266 App. Div. 696, aff'd 291 N. Y. 720. See also *Pollock v. Board of Regents*, 277 App. Div. 808, leave den. 277 App. Div. 285.

In the instant case, of course, Section 258 is not designed to prohibit *entirely* any advertising for patronage, but simply to prevent the use of words which New York's Legislature has found to be misleading. See also *Weber v. Stoddard*, 270 App. Div. 865, leave den. 270 App. Div. 960.

The police power extends to the prevention of the use of misleading words, even though the words are ones in common usage. See *People v. Somme*, 120 App. Div. 20, aff'd 190 N. Y. 541, where a prohibition against the use of the word "doctor" by a person unlicensed by the State of New York was enforced. See also *Bowen v. City of Schenectady*, 136 Misc. 307, aff'd 231 App. Div. 779, sustaining the constitutionality of a statute prohibiting the use of the title "architect" except by persons duly licensed by the Board of Regents. See also *Bratton v. Chandler*, 260 U. S. 110, sustaining the constitutionality of legislation prohibiting the use of a non-professional designation (real estate broker) except by persons properly licensed; and see *Holding Co. v. Reis*, 240 N. Y. 424, 427; *Roman v. Lobe*, 243 N. Y. 51.

In *People ex rel. Bennett v. Laman*, 277 N. Y. 368, 375, dealing with a medical practice statute, the Court of Appeals followed the rule in the *Dent* case (*supra*), that the police power authorized the State to prescribe all such regulations as in its judgment would tend to secure the people from the consequences of ignorance and incapacity, as well as of "deception and fraud." See also *People v. Bernstein*, 237 App. Div. 270 which involved the provision

in Section 1355 (now 6804) of the Education Law which made it a misdemeanor for unlicensed persons to advertise a place of business or refer to it "by the terms, 'drugs,' 'medicines,' 'drug store' or 'pharmacy'."

Where the legislative purpose is to prevent the public from being misled as to such matters, it is no defense that the misleading representation was made in "good faith." *People v. Mari*, 260 N. Y. 383. In that case, this Court held (pp. 388-9):

"When such conduct is a fraud or a pretense, as it appears to have been in this case, the courts are not so blind and dumb as to be taken in by it. It is no defense that defendant acted in good faith or did what was customary (*People v. Cole*, 219 N. Y. 98). The only question is whether he violated the statute. Of this there seems to be no doubt."

In the instant case, it is undisputed that the defendant deliberately violated Section 258 of the Banking Law. Contrary to the finding of Special Term, it is clear that the defendant was guilty of "wrongdoing, whatever may have been its "intention."

(4)

The Federal Government itself recognizes the necessity of preventing *misleading advertising* in its regulation of trade and commerce. Under the Federal Trade Commission Act, it has been held *unnecessary to prove that deceptive advertising was engaged in with intent to deceive*. See *Gimbel Bros. v. Federal Trade Commission*, 116 F. 2d 578; *L. & C. Mayers Co. v. Federal Trade Commission*, 97 F. 2d 365. See also *Trade Commission v. Raladam Co.*, 316 U. S. 149; *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509; *Gulf Oil Corp. v. Federal Trade Commission*, 150 F. 2d 106. And see *Federal Trade Commission v. Real Products Corp.*, 90 F. 2d 617.

Indeed, Congress has given the Federal Trade Commission the power to curb "any unfair method of competition or unfair or deceptive act or practice in commerce" (15 U. S. C. A., § 45)²¹; the dissemination of any false advertisement being defined by Congress as an "unfair or deceptive act or practice" (15 U. S. C. A., § 52b).

The New York Legislature was similarly entitled to consider the effect that the use of the words "saving" or "savings" by institutions which are *not savings banks* might reasonably be expected to have on the public. See *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 58.

Decisions of the Federal Courts under the Federal Trade Commission Act demonstrate that neither the Legislature nor Special Term was required to conduct a poll of public understanding or knowledge prior to determining that the use of the words "saving" and "savings" by non-savings banks, would be misleading to the public. See *Zenith Radio v. Federal Trade Commission*, 143 F. 2d 29, 31.

In the *General Motors Corp. v. Federal Trade Commission*, 114 F. 2d 33, Judge A. N. HAND stated (p. 36):

"It may be that there was no intention to mislead and that only the careless or the incompetent could be misled. But if the commission, having discretion to deal with these matters, thinks it best to insist upon a form of advertising clear enough so that, in

²¹ "Banks" are excepted from Trade Commission control by section 45, subdivision a, of the Trade Commission Act. In *Hurst v. Federal Trade Commission*, 268 F. 874, this exception was assumed to have been placed in the Act because "banks" were subject to the direction and control of a separate commission similar to the Trade Commission. It should be noted, however, that neither the Federal Reserve Board nor the Comptroller of the Currency has, so far as this record shows, promulgated any regulation purporting to deal with the subject of misleading advertising by *national banks*.

the words of the prophet, Isaiah, 'wayfaring men, though fools, shall not err, therein,' it is not for the courts to revise their judgment."

See also *Charles of Ritz, etc. v. Federal Trade Commission*, 143 F. 2d 676, 680; *Stanley Laboratories v. Federal Trade Commission*, 138 F. 2d 388, 392-3; and *Aronberg v. Federal Trade Commission*, 132 F. 2d 165-7.

In *Federal Trade Comm. v. Algoma Co.*, 291 U. S. 67, the federal government, exercising its regulatory power under the Commerce Clause, succeeded in prohibiting the misleading use of the words "California white pine." In sustaining the government's action, Justice CARDOZO pointed out (p. 75):

"There are times when a description is deceptive from the very fact of its simplicity."

Justice CARDOZO also recognized that (p. 78):

"Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Comm'n v. Royal Milling Co.*, 288 U. S. 212, 216; *Carlsbad v. W. T. Thackeray & Co.*, 57 Fed. 18."

He further stated (p. 81):

"An analogy may be found in the decisions on the law of trade marks, where the principle is applied that a name legitimate in one territory may generate confusion when carried into another, and must then be

given up. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 416; *United Drug Co. v. Rectanus Co.*, 248 U. S. 90, 100. More than half the members of the industry have disowned the misleading name by voluntary action and are trading under a new one. The respondents who hold out are not relieved by innocence of motive from a duty to conform. Competition may be unfair within the meaning of this statute and within the scope of the discretionary powers conferred on the Commission, though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, 12, 13; *Rawlins v. Wickham*, 3 De G. & J. 304, 317; *Hammond v. Pennock*, 61 N. Y. 145, 152. That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive."²²

In unfair competition cases, persons engaged in "simulation" of products, names or identities are deemed to have intended the results of their simulation. *Woodbury v. Woodbury*, 23 F. Supp. 162, 168; *My-T-Fine v. Samuels*, 69 F. 2d 76, 77. It is not necessary to show a "guilty knowledge" or "fraudulent intent." *Higgins v. Higgins*

²² These statements, with reference to federal powers under the commerce clause, are pertinent here, since State action under the police power is often directed toward objectives similar to those sought to be achieved by the federal government under the commerce clause. For example, see *Quaker Oats Co. v. City of New York*, 295 N. Y. 527, where both powers were directed toward regulation of the sale of horseflesh and other animal food.

Soap Co., 144 N. Y. 462, 471; *Lawrence Mfg. Co. v. Tennessee*, 138 U. S. 537, 549; *Aunt Jemima Mills v. Rigney*, 247 F. 407, 409.

The likelihood of confusion and the probability of deception have been held sufficient to warrant judicial protection in the field of unfair competition. *Eastern Const. Co. v. Eastern Engineering Co.*, 246 N. Y. 459, 463; *American Foundries v. Robertson*, 269 U. S. 372, 381. We argue that New York has, in the enactment of Section 258, acted to prevent deception and confusion of the public as to the nature of mutual savings institutions.

In this connection, it should be noted that even the right to use one's own name in his own business is subject to the qualification that one shall not use it for the purpose of perpetrating a fraud on the public. *Kraysler v. Kraysler*, 251 App. Div. 446; *World's D. M. Assn. v. Pierce*, 203 N. Y. 419, 424, 425.

And the common right to use geographical or descriptive terms, as well as an individual's right to use one's own name, has been held not to include "a use which is calculated to deceive." *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173; *Herring, etc., Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 559.

"The name of a person or of a town may have become so associated with a particular product that the mere attaching of that name to a similar product would have all the effect of a falsehood."

In unfair competition cases it has long been recognized, too, that words in common use may acquire a *secondary meaning*, in association with a particular enterprise or business. See 9 L. R. A. 148; *Elgin Nat'l Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; and 150 A. L. R. 1095.

See especially the cases cited in the annotation at 150 A. L. R., at pages 1134 and 1135, holding that protection of *property rights* in words which have acquired such secondary meaning will be granted where the defendant either is using the words in their secondary sense for purposes of simulation or where there is likelihood that the public will be deceived by the defendant's usage.

Of course, at the time the first subdivision of Section 258 was enacted in its present form, the New York Legislature was entitled to find that the words "saving" and "savings" had acquired a type of secondary meaning in association with the words "bank" or "banks"; and to decide that fulfilment of the legislative purpose to *protect the public from deception* warranted a prohibition against the use of the words by *any* bank other than a "savings bank." See 1922 Report of the Attorney General 139.

B. Section 258 of the Banking Law indicates a legislative determination to protect the public from the misleading use of the words "saving" and "savings" in advertising any banking business. *People v. Binghamton Trust Co.*, 139 N. Y. 185; *People v. Franklin National Bank*, 305 N. Y. 453.

Section 258 of the Banking Law, in its first subdivision, prohibits the use by any banks or institution, other than a savings bank, of the words "saving" or "savings" in "its financial business" or in "any advertisement"; and prohibits any individual or corporation "other than a savings bank" from "in any way" soliciting or receiving deposits "as a savings bank."

The legislative purpose of the prohibition is to prevent misleading representation. New York's Court of Appeals, dealing with an earlier form of this statute, has so held.

People v. Binghampton Trust Co., 139 N. Y. 185.²³ In that case, the Court of Appeals rejected the proposition that the object of Section 258 (then Section 283) was to create a monopoly in favor of savings banks.

At the time the *Binghampton Trust* case (*supra*) was decided, the statute prohibited any corporation from advertising or putting forth a sign "as a savings bank." The statute then read (L. 1882, ch. 409, § 283):

"It shall not be lawful for any bank, banking association or individual banker, firm, association, corpora-

²³ The entire history of this statute confirms the correctness of this holding. As long ago as 1858, New York prohibited banks other than savings banks from advertising as savings banks. By Chapter 132 of the Laws of 1858, the Legislature enacted a provision that:

"* * * it shall not be lawful for any bank, banking association or individual banker authorized to issue circulating notes by the laws of this State, established in any city or village where a chartered savings bank is located and transacting business, to put forth a sign as a savings bank:"

By 1875, the prohibition had been amended to read (L. 1875, Ch. 371, § 49):

"It shall not be lawful for any bank, banking association or individual banker to advertise or put forth a sign as a savings bank or in any way to solicit or receive deposits as a savings bank; and any bank, banking association or individual banker which shall offend against these provisions shall forfeit and pay for every such offence the sum of one hundred dollars, for every day such offence shall be continued, to be sued for and recovered in the name of the people of this State, by the district attorneys of the several counties, in any court having cognizance thereof, for the use of the poor chargeable to said county in which such offence shall be committed."

The 1875 provision was construed in *People v. Doty*, 80 N. Y. 227, not to apply to "individuals" who operated as private bankers, but only to "individual bankers" authorized to do business as such under the Banking Laws. The Court recognized that its construction of the statute permitted misleading advertising by *individuals not authorized to do a banking business* under our Banking Law, but prohibited misleading advertising by *authorized bankers* (80 N.Y. 227, 230, 235). Hence, the specific provision in the present statute directed against any "individual".

tion, person or persons, to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank; and any bank, banking association or individual banker, firm, association, corporation, person or persons, which shall offend against these provisions, shall forfeit and pay for every such offence the sum of one hundred dollars for every day such offence shall be continued, to be used for and recovered in the name of the people of this State, by the district attorneys of the several counties, in any court having cognizance thereof, for the use of the poor, chargeable to said county in which such offence shall be committed."

In the *Binghampton Trust* case, the stipulated facts were that the bank had simply set forth in its passbooks certain interest rules similar to those employed by savings banks. These rules did not use the words "saving" or "savings" or contain any other statements that were calculated to deceive or mislead the public. Accordingly, the Court held that no violation of the statute had been shown. The Court declined to accord to savings banks any "monopoly of any set of business rules"²⁴ and held that the statute embodied (139 N. Y., 190):

"the legislative intention that a corporation shall not, in soliciting and receiving deposits, represent, or hold out itself as a savings bank so as to deceive the public."

As to circulars and advertisements distributed by the bank, the facts as to which were also stipulated, the Court was unable to find that there had been (139 N. Y., 190):

²⁴ In this case no attempt is made to set up any such monopoly of rules. We simply seek to prevent misleading representation of the defendant as a "savings bank."

"either a soliciting of deposits from the public in the character, or under the pretense of being a savings bank, or an advertising of the corporate business in such manner as to deceive persons into believing it to be that of a savings bank, • • •" (Italics supplied.)

Repeating its holding that there could be no exclusive appropriation of business methods, the Court further stated (139 N. Y., 192):

"Whatever tends to the protection of a bank for savings is in the public interest, and it is in the line of that protection that any appearance, or external sign, or representations should be prohibited, which would deceive and cause the public to suppose that a business institution, really organized for the gain of its members, was a savings bank. But the line ends with securing that general protection against public deception, and does not project itself into the mere methods by which transactions with depositors or dealers are conducted." (Italics supplied.)

Subsequent legislation, therefore, in fulfillment of the purposes of old section 283 of the Banking Law may be deemed to have been directed toward accomplishment of the purpose set forth by the Court of Appeals—"general protection against public deception" particularly with relation to the subject of whether an institution is a non-profit, mutual institution, or one "organized for the gain of its members."²⁵

Nothing in any of the amendments to old section 283 (present section 258) indicates any legislative intention

²⁵ Cf. *United States v. 5 Gambling Devices*, U. S., decided December 7, 1953, where a Congressional Act's constitutionality was attacked for "vagueness." New York has avoided this pitfall by being precise and specific in indicating two words which it regards as deceptive.

to deviate from the general purpose ascribed to it in the *Binghamton Trust Company* case. The amendment of 1892, by which the section was renumbered as section 131, removed certain language as to the method of prosecution, but continued the statutory prohibition in substantially the same form:

“§ 131. Advertisements of unauthorized savings banks prohibited.—No bank, banking association, individual banker, firm, association, corporation, person or persons shall advertise or put forth a sign as a savings bank, or in any way solicit or receive deposits as a savings bank.”

In 1904 (L. 1904, ch. 568) section 131 was amended to give express authorization to school officials to make savings collections from pupils and to use the words “system of school savings banks” or “school savings banks” in circulars, reports and other printed or written matter in connection therewith.

In 1905, section 131 was amended to bring it substantially to its present form. It was by that amendment that the misuse of the word “savings” was first forbidden under this section of the Banking Law. The first sentence of section 131 was amended to read as follows (L. 1905, ch. 564):

“§ 131. Advertisements of unauthorized savings banks prohibited.—No bank, banking association, individual banker, firm, association, corporation, person or persons shall make use of the word ‘savings’ in their banking business, or advertise or put forth any advertising literature, or sign as a savings bank, or in any way solicit or receive deposits as a savings bank, other than a savings bank or a building and loan association organized under the laws of the State of New York.”

Thus for more than 40 years prior to the time defendant first violated the statute, the legislature had prohibited

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per advertising containing the word "savings." And most a half-century before Special Term's decision, constitutionality of the prohibition had not been successfully challenged. It may be noted that the 1905 statute enacted an exception in favor of "building and loan associations" organized under New York Law. This exception in favor of certain mutual, non-profit associations, made to apply in 1909, instead, to "cooperative savings and loan associations" organized under New York L. 1909, Ch. 497), the section having been renumbered in the 1909 revision of the Consolidated Laws, as section 160 of the Banking Law.²⁶ It should be noted that, as amended, section 160 also permitted school officials, under exception, to deposit "school savings" in villages and cities where there was no savings bank "in any savings bank, association, trust company, state or national bank, or in the state and having an interest department."

This section was renumbered in the Banking Law of 1914 as section 279 (L. 1914, Ch. 369). As amended in 1914, section 279 was divided into two subdivisions, the first

since 1909, the purpose of the Legislature appears to have been the protection of this section to potential savings and loan association investors as well as to potential savings bank depositors. The present section 258, up to the word "nor". In any event, whether the Legislature be deemed in section 258 to have acted solely for the purpose of protecting potential savings bank depositors or to have acted for the purpose of protecting a broader group of persons interested in mutual investments, the power exercised was a proper exercise of the police power, calculated to prevent the deception of the public.

And, even if the Legislature by this statute be found not to have covered all possible misrepresentations (e. g. the possible misrepresentation by a savings and loan association that it was a savings bank), the statute does not, as a result, become unconstitutional. The statute is not invalid because it might have gone farther than it did in *Roschen v. Ward*, 279 U. S. 337, 339. *Semler v. Dental Exam-iners*, 294 U. S. 608, 610; *Salsburg v. Maryland*, 322 U. S. 548, 551, 61 S. Ct. 1181, 40 L. Ed. 2d 101, 1 Jan. 11, 1954. See also Banking Law, Art. X; and 12 U. S. C. §§ 1464, *et seq.* And see *Rochester Savings Bank v. Rochester Loan Assn.*, 170 Misc. 983.

dealing with the prohibition and the second with the exception for "school savings" accounts. In its 1914 form, the prohibitory portion of the first subdivision read as follows:

"§ 279. Advertisements of unauthorized savings banks and the use of the word 'savings' prohibited; exception as to school savings.

"1. No bank, national banking association, trust company, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or its equivalent, in its banking business, or advertise or put forth any advertising literature or sign containing the word 'saving' or 'savings,' or its equivalent, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank."

The 1914 amendment thus made the prohibition specifically applicable to "national" banking associations and extended it beyond the word "savings" to include the words "'saving' or 'savings' or its equivalent."²⁷

²⁷ In 1916, it was again amended (L. 1916, Ch. 90), but only in the portion thereof (by then numbered subdivision 2) dealing with "school savings banks" or "Thrift funds." Subdivision 2 of the section was amended by Chapter 128 of the Laws of 1920 and by Chapter 22 of the Laws of 1923.

By L. 1952, ch. 546, effective April 7, 1952, the exception contained in subdivision 2 of the section (by then numbered 258) was extended to permit school savings moneys to "be deposited in some savings bank in the state, be used for the purchase of shares in any savings and loan association organized under this law, or under the laws of the United States, whose principal office is located in the state of New York, or be deposited in any trust company or state or national bank located in the state, and having an interest department." The same amendment struck from subdivision 2 the sentence which had theretofore stated it to be lawful to use the words "system of school savings banks" or "school savings banks" or "thrift funds" in circulars, reports and other printed or written matter used in connection with the purposes of subdivision 2.

In 1932, the first subdivision of section 279 (now 258) was amended so that it permitted the use of the word "savings" in the name of the savings and loan bank of the State of New York (L. 1932, Ch. 604); and in 1934, the exception was further broadened to cover "the name of any trust company all of the stock of which is owned by not less than twenty savings banks" (L. 1934, Ch. 255 which also contained a separability provision).

In 1938, old Article Six of the Banking Law was repealed and a new Article Six enacted, in which Section 258 replaced old Section 279 (L. 1938, Ch. 352). Subdivision 1 of Section 258 remained in the same form as had the first subdivision of old Section 279.

Subdivision 1 of Section 258 was last amended by Chapter 585 of the Laws of 1941, which extended the prohibition of the subdivision to apply to the misuse of the words not only in "banking" business, but also in "financial" business. The provision, as so amended, took effect April 20, 1941 and it remains unchanged to date.²⁸

The very wording of these amendments to the section indicates that the legislative purpose continued to be one of preventing the public from being misled by usage of the words "saving" or "savings" into believing that an institution which had not been organized as a *mutual savings bank* under the provisions of Article 6 of the Banking Law was such an institution.

The exceptions contained in the present statute confirm this interpretation as the correct one to be given the statute. For "*savings and loan*" association, as well as savings banks, are permitted to use the words "savings" and "saving" in their business and their advertisements. *This*

²⁸ An attempt was made in the regular session of the 1953 Legislature to have the provisions of subdivision one of section 258 stricken (Ass. Pr. No. 2798, Int. No. 2693; Senate Pr. No. 2716, Int. No. 2570). *It failed.*

exception extends, of course, to federal as well as state chartered savings and loan associations. Clearly, the Legislature has refrained from prohibiting the use of the word "savings" as to those financial institutions where it found that usage of the term would *not* be misleading to the public.

(2)

The policy of New York State to prevent the words "saving" and "savings" from being used in *misleading advertising* was long ago underlined by opinions of New York's Attorney General. See 1898 Report of the Attorney General, pages 265-267; 1902 Report of the Attorney General, pages 314-315; 1907 Report of the Attorney General, pages 473-475; 1908 Report of the Attorney General, pages 382-383; 10 State Department Reports, pages 489-491 (Attorney General's Opinion, dated January 2, 1917). These Opinions also noted a legislative policy to accord to depositors in savings institutions protection against the misleading use of those terms by national banks.

As early as 1907, the New York Attorney General had advised the New York Superintendent of Banks that national banks had no "right or authority in their banking business to hold themselves out as savings banks or to advertise as such" and that old section 131 of the Banking Law (now Section 258; see, *supra*, pp. 56-57) was "applicable to all national banks doing business in this state."

In the 1907 Opinion, New York's Attorney General properly placed great emphasis upon *Bank of Redemption v. Boston*, 125 U. S. 60, where this Court rejected a claim that a Massachusetts statute contained a provision improperly taxing shares of stock in a national bank at a higher rate than moneyed capital in hands of individual citizens of Massachusetts, which was kept on deposit in savings banks. Congress had by section 5219 of the Revised

utes expressly permitted shares in a national bank be taxed by any State, in which a bank was located, at a rate no greater than the rate assessed upon other *owned capital*²⁹ in the hands of individual citizens of the state. This Court, after citing its prior decisions in *Mercantile Bank v. New York*, 121 U. S. 138 and *Davenport Bank v. Davenport Board of Equalization*, 123 U. S. 83, sustained the exemption of money on deposit in *savings banks* from taxation, even though national bank shares were taxed in the same manner as other *corporate* shares.

This Court stated, in the language later quoted in the 7 Opinion of the New York Attorney General (125 S., at p. 68; 1907 Report of the Attorney General 474):

"It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which fore-

²⁹ Note the emphasis which has been placed both by Congress and the Court upon the distinction between organizations with and without capital stock, as offering an appropriate basis for different treatment. *Bank of Redemption v. Boston*, 125 U. S. 60.

closes further discussion as to the present point in this case."

This Court thus approved the Massachusetts policy of differentiating between the treatment of mutual savings institutions and stockholder-owned commercial banking institutions. In so doing, it adhered to the position it had taken in dealing with a New York statute similarly favoring savings banks deposits with relation to taxation. In the *Mercantile Bank* case, this Court, referring to deposits in New York savings banks had stated (121 U. S. 138, 161):

"No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the state. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community." (Italics supplied.)

Congressional intent at that time, therefore, must be deemed to have been to place national banks, for purposes of state taxation, on an equal footing with state *commercial* banks (institutions organized for gain or profit) and not subject to the same special considerations of protection accorded to mutual, non-profit savings institutions.³⁰

³⁰ With respect to *taxation*, Congress, in its search for new revenues, recently determined to discontinue the tax-free treatment accorded mutual institutions. (See the Revenue Act of 1951; Senate Report No. 781, September 18, 1951, re Tax Exempt Organizations, Subd. V B.) The removal of this exemption appears to have been based in part upon a Senate finding that mutual savings banks compete "with commercial banks and life insurance companies for the public savings." The existence of such competition would appear to make it all the more necessary that rules of *fair* competition be respected.

In 1908, the New York Attorney General advised the New York Superintendent of Banks, concerning section 131 (now section 258) of the Banking Law, as amended by Chapter 564 of the Laws of 1905 (1908 Report of the Attorney General, p. 383):

"This law was not enacted for the benefit of any private interest but solely for the protection of the public. It would seem that any use of the word 'savings' in advertising a bank would be a suggestion or a pretense made to the public that the bank so advertising was doing business as a savings bank. Many expressions, other than the word 'savings,' but with similar meaning, could be used without conflicting with the above law and without possible deception.

In my opinion the use by the First National Bank of the word 'savings' at the head of the advertisement inclosed is a violation of law."

In 1917, the New York Attorney General advised the New York Superintendent of Banks that section 279 (now 258) of the Banking Law was not in conflict with section 19 of the Federal Reserve Act, which defined "demand deposits" to include all "savings deposits" which were subject to not less than thirty days notice before payment. The Attorney General wrote, in part (10 State Department Reports, p. 491):

"We cannot deny the right of national banks to receive deposits in the form of 'savings accounts,' but we feel quite certain that the above language does not empower such banks to do a 'savings bank business' as that business has come to be generally understood throughout the country, and therefore we are of the view that the State statute (section 279 of the Banking Law) is still operative against the use of the word 'savings' by any bank 'other than a' savings bank.

• • •

The words 'savings banks' have accordingly come to have a special meaning to small savers as denoting this increased protection to their deposits, and they would be deceived by its use by other banks. As *Congress did not*, we believe, intend to authorize a national bank to do business as a 'savings bank,' so it did not *intend to interfere with any safeguards for the small savings depositor which the State may have devised to protect him*. You may consult generally the cases distinguishing between a 'savings bank business' and the business of receiving deposits in the form of savings accounts. *People v. Binghamton Trust Co.*, 139 N. Y. 185; *Barrett v. Bloomfield Savings Institution*, 54 Atl. Rep. (N. J.) 543, 552; *State v. Peoples National Bank*, 70 id. (N. H.) 542.

It may be stated also that it is the duty of the Attorney General to sustain State statutes such as section 279 of the Banking Law unless he is convinced that such legislation is no longer of force.

In conclusion section 19 of the Federal Reserve Act concerns itself only with the reserve necessary to protect different forms of deposits. No sanction is found therein for the use of the words 'savings department' by national banks in their business." (Italics supplied.)

Since 1917, therefore, it had been apparent that New York did not intend to permit national banks to advertise as savings banks or to use the words "saving" or "savings" or "its equivalent", in the absence of some clear Congressional action indicating an express intention to curtail the State's power to safeguard small depositors from misleading advertising. Yet Congress has not in the intervening years enacted any such legislation.

(3)

In *Provident Savings Institution v. Malone*, 221 U. S. 660, this Court recognized that a need existed for specially

protecting the depositors of savings banks and that the difference between deposits in savings and other banks afforded a reasonable basis for classification in legislation. Here the Massachusetts statute as to abandoned funds applied only to deposits in savings banks. For a unanimous Court, JUSTICE LAMAR wrote (p. 666):

"There is nothing unequal or discriminatory in making the act applicable only to abandoned deposits in a savings bank. The classification is reasonable. Deposits in savings banks are made in expectation that they may remain much longer uncalled for than is usual in deposits in other banks. This fact makes savings deposits all the more likely to be forgotten and abandoned. And as the depositors are often wage earners, moving from place to place, there is special reason for intervening to protect their interest in this class of property in banks as to which the State's supervisory power is constantly exercised."

In New York, savings banks had been created by special statutes until 1869.³¹ Then the Legislature enacted a general statute (L. 1869, ch. 213) to regulate and restrict the organization of savings banks and institutions for savings, which prescribed the procedure to be followed in the organization of a bank, but still required legislative sanction for a savings bank's incorporation. In 1875, an act was passed (L. 1875, ch. 371) to conform the charters of *savings banks to a uniformity of powers and rights* and provide for the organization of savings banks, their supervision and the administration of their affairs. As amended, the 1875 statute was included in the Banking Law (L. 1892, ch. 689). See the Consolidator's notes to the Banking Law (McKinney's Banking Law, Vol. 1, p. 6).

³¹ "Moneyed" banking organizations, or banks of "deposit and discount" had been chartered in New York, however, by special legislation only until 1838, when a general law was passed whereby banks might be authorized and incorporated (L. 1838, ch. 260; McKinney's Banking Law, vol. I, p. 5).

Probably since 1819 (R. 284) and at least since 1875, therefore, New York has provided for the creation of a distinctive type of banking institution known as a "savings bank." Section 258, in effect, seeks to protect the distinctiveness of that type of institution and to prevent the use of the word "savings" by other banking institutions, since it is likely to confuse and mislead the public into believing that such bank is a New York "savings bank."

By reason of the fact that mutual savings institutions of the type permitted and regulated by Article 6 of the Banking Law had been designated as "savings banks" in New York for more than a century prior to the time Section 258 was enacted in its present form, its Legislature was justified in assuming that the use of the prohibited terms by banking institutions otherwise organized would be misleading and confusing to the public.

While it is true that the money taken by commercial banks and held in their thrift or passbook accounts represents individual accumulations, just as savings bank accounts do, there is no requirement that the commercial banks make their *investments* in a specific list of securities as to which New York's Legislature, before authorization, has balanced carefully the safety of the principal invested as against a fair rate thereon. But even more important by way of distinction between New York's mutual savings institutions and commercial banks, is the fact that commercial banks, with their right to deal in demand deposits, have the power to create money while the savings institutions do not. For every dollar that goes on the books of a savings bank as an investment asset, the savings bank must have received a dollar in the form of a deposit. Commercial banks, on the other hand, can, through discount and other lending operations, extend immediate credit to a customer. This ability on the part of commercial banks to create "money" and thereby to increase its "assets" carries with it certain risks, even though commercial banks, in connection with their demand deposits, furnish a vital community

service. But since there are no limitations upon the uses to which thrift monies deposited in commercial banks can be put, these thrift dollars are subjected to the risks developed by the banks' commercial activities.

Even though the Legislature has in some respects extended the investment powers of savings banks within recent years (Court of Appeals, Brief, Point II of the New York State Bankers Association), the basic banking policy of the State has been for more than 100 years to furnish the public with a specialized type of institution to deal with a special type of sluggish deposit with a comparatively low turnover rate. Once these deposits are separated from the more volatile commercial transactions they may be put out in investments at longer terms which produce a higher yield without undue risk to depositors' funds. That policy is the foundation stone of New York's legislation dealing with both types of mutual institutions. We believe this differentiation is sound and that it is a State legislative problem basically to determine whether to continue to identify the specialized institutions by a particular name, whose use is prohibited to the jack-of-all-trades.

The entire spirit of the defendant's conduct was revealed by its assertion before the Appellate Division (p. 51) that "The fact that a savings bank has no stockholders while a national bank has is of no practical consequence to a depositor."³² Even if depositors do not specifically know of this

³² In the Court of Appeals, too, the appellant continued to urge that savings deposits in national banks "are the same" as those in New York mutual savings Banks (Court of Appeals Brief, p. 58), disregarding again the vast differences between the nature and powers of the institutions in which the deposits were made and the nature of the *obligation* of national banks to pay *interest* at the rates to which they agree. Compare to the national bank's contractual *obligation* to pay *interest* on its passbook deposits, the dividends to which depositors in a New York mutual savings bank do not become entitled until after they have been declared *out of undivided profits* by strictly regulated savings banks' trustees. New York Banking Law, §§ 244, 245.

distinction, they are and have been entitled to protection such as that afforded by Section 258, a "police regulation, the sanction of which lay in the constitutional power of the State and not in contract." *Abie State Bank v. Bryan*, 282 U. S. 765, 782.

Defendant in the Appellate Division (p. 51) took us to task for not specifying the safeguards which the State had erected about savings banks and for our failure to refer to any safeguards surrounding savings and loan associations. This we deemed unnecessary, for even Special Term had realized that such safeguards had been erected as to savings banks and so stated, before it fell into error (R. 664). New York savings banks do not make commercial loans. They do not accept demand deposits. If greater detail be needed, the Court is respectfully referred to the provisions of Articles VI and X of the New York Banking Law, dealing with savings banks and savings and loan associations, respectively.

Significant in this respect was the defendant's unguarded confession in the Court of Appeals that national banks, unlike New York savings banks, are unrestricted by state law as to the "amount which may be received from particular depositors, the corporate or individual nature of the depositor, the manner of withdrawal" (Def't's Court of Appeals Brief, p. 19), or in respect of other safeguards designed to protect savings bank depositors in New York. More amazing is the virtue which the appellant now (Br. pp. 78-79) makes of the fact that the funds it obtains by passbook deposits may be used for commercial and personal loans.

Our statute is completely non-discriminatory *vis-a-vis* federal banking institutions. Its restriction is directed against national banks no more than it is directed against other "non-savings banks." And its exception in favor of "savings and loan" associations extends, without qualification, in favor of federal as well as state associations of that type.

We did not believe that the defendant would continue to argue that a national bank, a type of stock corporation, should be given any special privilege to mislead or confuse the public into believing that it is a bank organized as a savings bank under Article 6 of the New York Banking Law. Such an argument is particularly inappropriate in the light of the fact that the National Banking Act contains a provision, similar to that contained in Section 258, prohibiting the use by banks other than national banks of the words "national," "Federal," or the words "United States," separately or in combination with other words, except by institutions organized under the laws of the United States (12 U. S. C. A., §§ 583-4); and a prohibition exists against false advertising or representation as to membership in the federal reserve system (12 U. S. C. A., § 586).

At least in the absence of explicit contrary action by Congress, New York would seem to have the same right as the federal government to protect its citizens from misleading advertising.

POINT II

National banks may not disregard a State's standard of honest business dealing.

The New York Court of Appeals did not dispute the paramount power of Congress to regulate national banks and the supreme role of Federal laws enacted in that field. But it noted that (R. 686):

"* * * national banks are subject in many ways to the general laws of the States in which they exist, and must abide by State regulations insofar as the latter do not collide directly with Federal laws, and insofar as they do not frustrate national banking policy or impair the position of national banks in discharging their duties; national banks must obey all non-discriminatory State laws which do not inter-

fere with the functioning of the banks, and which do not contravene Federal laws.”

In support of these principles, it cited (R. 686-687):

First Nat. Bank v. California, 262 U. S. 366, 368;
Burnes Nat. Bank v. Duncan, 265 U. S. 17;
Lewis v. Fidelity Co., 292 U. S. 559, 566;
Seabury v. Green, 294 U. S. 165, 169;
Jennings v. U. S. F. & Co., 294 U. S. 216;
Anderson Nat. Bank v. Lockett, 321 U. S. 233;
Roth v. Delano, 338 U. S. 226, 230;
Standard Oil Co. v. New Jersey, 341 U. S. 428, 441;
Lauer v. Bayside Nat. Bank, 244 App. Div. 601;
Matter of Baldwinsville Fed. Sav. & Loan Assn.
 [Van Wie], 268 App. Div. 414, 422, 423;
Clark v. First Nat. Bank of Morrisville, 130 Misc. 352, 354;
United States Pipe & Foundry Co. v. City of Hornell, 146 Misc. 812, 815;
Matter of Keene, 152 Misc. 424, 425;
 7 Michie on Banks and Banking, ch. 15, §§ 3, 4, 5.

See also:

Waite v. Dowley, 94 U. S. 527, 533;
National Bank v. Commonwealth, 9 Wall. 353;
Farmers and Merchants Bank v. Federal Reserve Bank, 262 U. S. 649;
Middletown Trust Co. v. Middletown National Bank, 110 Conn. 13, 147 Atl. 22;
State v. People's National Bank, 75 N. H. 27, 70 Atl. 542.

In *McClellan v. Chipman*, 164 U. S. 347, a Massachusetts statute against *fraudulent transfers* was held to apply to national banks. In the *McClellan* case, Justice WHITE wrote (164 U. S., 359):

“As long since settled in the cases already referred to, the purpose and object of Congress in enacting the

national bank law was to leave such banks as to their contracts in general under the operation of the state law, *and thereby invest them as Federal agents with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.*" (Italics supplied.)

should be noted that as early as the *McClellan* case, this Court unanimously declined to give to state legislation "a strained and unreasonable construction" in order to find conflict between the state and federal legislation (pp. 9-360).

On the subject of the alleged conflict between the Massachusetts statute and the National Banking Act provisions titling national banks to take real property in satisfaction of an antecedent debt, this Court, first referring to the authority of the National Bank Act, wrote (p. 358):

"The argument is that as this statute permits national banks to take real estate for given purposes, therefore the Massachusetts law which forbids a transfer of property, with a view to a preference, in case of insolvency, where the transferee has reasonable cause to believe that the transferrer is insolvent or in contemplation of insolvency, in no way controls the contracts or dealings of a national bank. But this position denies the general rule just referred to, and amounts to asserting that in every case where a national bank is empowered to make a contract, such contract is not subject to the state law. *In the case in hand there is no express conflict* between the grant of power by the United States to the bank to take real estate for previous debts, and the provisions of

the Massachusetts law, which, although allowing as a general rule the taking of real estate, as a security for an antecedent debt, provides that it cannot be done under particular and exceptional circumstances. *Nor is there anything in the statutes of the State of Massachusetts, here considered, which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the State are subjected, one of which limitations arises from the provisions of the state law which in case of insolvency seeks to forbid preferences between creditors.*" (Italics supplied.)⁴⁰

⁴⁰ The contracts of national banks, unless *ultra vires* under the federal statutes, have been held to be governed by state law. *National Bank v. Commonwealth*, 9 Wall. 353, 362. Both state common law and statutory law may apply. *Nakdimen v. First Nat. Bk. of Fort Smith*, 117 Ark. 303, 6 S. W. 2d 505, cert. den. 278 U. S. 635; *Jennings v. U. S. F. & G. Co.*, 294 U. S. 216, 219; *Dakin v. Bayly*, 290 U. S. 143; *Matter of Hickmott*, 256 App. Div. 1047.

The liability of national banks in torts has also been governed by local law. *National Bank v. Graham*, 100 U. S. 699 (negligence in custody of bonds for safekeeping); *First National Bank of Grand Forks v. Anderson*, 172 U. S. 573 (conversion of notes). Note particularly *Singleton v. Harriman*, 152 Misc. 323, aff'd 241 App. Div. 857 where, under New York law, the Harriman National Bank was held liable, in damages, for its officer's *misrepresentations* in the sale of stock; and *Pronger v. Old National Bank*, 20 Wash. 618, 56 Pac. 391 where a national bank was held liable, despite an *ultra vires* defense, for its officers' *fraud* in sale of promissory notes; and see 35 Col. L. Rev. 416, 418n.

So, too, criminal laws of the States have been applied to national banks and their officers. See *Cross v. North Carolina*, 132 U. S. 131, where a statute prohibiting forgery was held applicable to the president and cashier of a national bank. *Easton v. Iowa*, 188 U. S. 220, 238-9, would appear to be distinguishable on the ground that the penal statute there involved tended to interfere with federal super-

(Continued on following page)

may be that where, as here, Congress has not legislated on the subject, State legislation will be sustained unless it impairs the efficiency of national banks in the discharge of their *governmental functions*. *Farmers and Mechanics National Bank v. Dearing*, 91 U. S. 29; *Davis v. Mira Savings Bank*, 161 U. S. 275, 283; *First National Bank of San Jose v. California*, 262 U. S. 366, 368; *First National Bank v. Missouri*, 263 U. S. 640. See also *Emer. Corp. v. West. Union*, 275 U. S. 415, 416, 425-426; *National Labor Relations Board v. Bank of America*, 130 F. 2d 624, 626-627, cert. den. 318 U. S. 791, indicating the essentially private and non-governmental character of national banks, even though they may be occasionally and incidentally called upon by the government to aid in carrying out its fiscal policies.

There would appear to be no doubt, however, that a State could, without impairing the efficiency of a national bank, require the performance of its governmental or ordinary banking functions, compel it to live up to the ordinary standards of honesty and fair dealing required of others in the business community, even though some pecuniary disadvantage might result from such adherence to local standards. *Mellan v. Chipman*, 164 U. S. 347; *Middletown Trust Co. v. Middletown National Bank*, 110 Conn. 13, 147 Atl. See also *Comanche v. Johnston*, 170 Okl. 515, 41 P. 2d

(continued from preceding page)

the insolvency of insolvent national banks, a subject *expressly* covered by the National Banking Act. Note that even in a national bank's receivership, this rule has been relaxed to give effect to state law. *Booth v. Delano*, 338 U. S. 26.

In the absence of any clear prohibition in the National Banking Act, this Court has sustained the right of a stockholder under the common law of the State to inspect the stock books of a national bank. It has refused to hold that inspection was barred by the provisions of the National Banking Act exempting national banks from "the visitatorial powers other than" those authorized by the Act or by the courts of justice. *Guthrie v. Harkness*, 199 U. S. 148.

115; *Schramm v. Bank of California*, 143 Ore. 546, 578, 20 P. 2d 1093, 1103-4.

We shall show (*infra*, pp. 104-113), how even in the field of taxation of national banks by the states, there has been a distinct trend away from the absolute tendency to immunize "federal instrumentalities from state legislation." It would seem utterly inconsistent, therefore, to swing in the opposite direction, as Special Term did, in connection with a law relating to a simple standard of honesty and fair business dealing.

In *Anderson National Bank v. Lockett*, 321 U. S. 233, a statute directing payment to the State of Kentucky of presumptively abandoned accounts of national and state banks was held not to interfere unconstitutionally with a national bank as an instrumentality of the federal government. Chief Justice STONE wrote (pp. 247-248):

"We come now to appellant's second contention, that the Kentucky statute infringes the national banking laws and unconstitutionally interferes with appellant as an instrumentality of the federal government. Both the statute does not discriminate against national banks, cf. *McCulloch v. Maryland*, 4 Wheat, 316, by directing payment to the state by state and national banks alike of presumptively abandoned accounts. Nor do we find any word in the national banking laws which expressly or by implication conflicts with the provisions of the Kentucky statutes. Cf. *Davis v. Elmira Savings Bank*, 161 U. S. 275."

Chief Justice STONE continued (p. 248):

"This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions.

Waite v. Dowley, 94 U. S. 527, 533; *First National Bank v. Missouri*, 263 U. S. 640, 656; *Lewis v. Fidelity Co.*, 292 U. S. 559, 566; *Jennings v. U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 219. Thus the mere fact that the depositor's account is in a national bank does not render it immune to attachment by the creditors of the depositor, as authorized by state law. Compare *Earle v. Pennsylvania*, 178 U. S. 449, with *Van Reed v. People's National Bank*, 198 U. S. 554.

e further noted (pp. 248-249):

"For an inseparable incident of a national bank's privilege of receiving deposits is its obligation to pay them to the persons entitled to demand payment according to the law of the state where it does business."

Justice STONE concluded (pp. 252-253):

"Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs. *Waite v. Dowley*, *supra*; *Colorado Bank v. Bedford*, 310 U. S. 41, 53."

Equally significant is this Court's holding that there is nothing unequal or discriminatory about a state law relating to abandoned property which made it applicable only to abandoned property in a savings bank. *Provident Savings Institution v. Malone*, 221 U. S. 660. That statute directed toward savings banks, alone, was held as constitutional. See also *Roth v. Delano*, 338 U. S. 226, permitting the state to assert its escheat power even in a national bank receivership, provided there was

no interference with the federal function of orderly liquidation and no conflict with federal law. See, too, *Conn. Mut. Life v. Moore*, 333 U. S. 541.

In *Lewis v. Fidelity Co.*, 292 U. S. 559, which dealt with the type of security that a national bank might give as the security for the deposit with it of the funds of a state or a political subdivision thereof, pursuant to the Act of 1930, Ch. 604 (12 U. S. C. A., § 90), it was held that the main purpose of the 1939 Act was to equalize the *powers* of state and national banks, by giving the national banks the *power* to furnish the same type of security the state banks furnished for those deposits.

⁴¹ The *Lewis* case was followed in *Matter of Baldwinsville Fed. Sav. & Loan Assn.*, 268 App. Div. 414, and in *Lauer v. Bayside National Bank*, 244 App. Div. 601. In the *Lauer* case, however, the Court held the provision of section 10 of the Stock Corporation Law, relating to the right of stockholders to inspect the stock books of a corporation to be inapplicable to national banks since it found that the National Banking Act (12 U. S. C. A., § 62) had covered the subject of such inspection. The federal statute contained no provision for a penalty for non-production of such books, but the New York statute did. The Court found that this difference constituted a "conflict"; and upon the assumption that a federal legislation covered the field of "inspection" of the records of a national bank, refused to enforce the State provision for a penalty. But see the same Court's decision in *Matter of Schwamm v. United National Bank of Long Island*, 269 App. Div. 692, permitting inspection of national bank stock lists; and compare *People, etc. v. Coast Federal Sav. & Loan Ass'n*, 98 F. Supp. 311, involving a federal savings and loan association, for whose regulation, it was held, Congress had made complete provision by legislation, to "embrace the entire field"; and as to which comprehensive rules and regulations had been promulgated, pursuant to *Act of Congress*.

POINT III

Congress has not authorized national banks to violate state standards of fair competition by using the words "saving" or "savings" in advertising the performance of their functions as national banks. Nor has Congress authorized national banks in any other way to masquerade as State-organized "savings banks."

No Act of Congress authorizes national banks to parade as state-organized savings banks or to assume an identity other than that of a national bank. Likewise, no federal legislation specifically authorizes national banks to use any words, phrases or terminology in their national banking business which would contravene state prohibitions against misleading advertising. Most significant, however, in the absence of any federal legislation authorizing national banks to use the terms "saving" or "savings" in their advertising or otherwise in their business.

Contrast Congressional action when, in dealing with the organization of federal savings and loan associations, it expressly authorized the organization and incorporation of such associations to be known as "Federal Savings and Loan Associations" (12 U. S. C. A., § 1464). The express and specific provisions of the Federal Home Loan Act governing federal savings and loan associations were the basis of the Massachusetts decision in *Springfield Inst. for Savings v. Worcester F. S. & L. Assn.*, 329 Mass. 124, 17 N. E. 2d 315, cert. den. 344 U. S. 884, upon which the appellant so strongly relied below (Def'ts Ct. of Appeals Brief, pp. 16, 33, 34, 41, 42, 74; cited here at footnote, 51).

More pertinent here than the *Springfield* case is the earlier Massachusetts case of *Commonwealth v. McHugh*, 363 Mass. 249 (1950), where the restraints of the State's

anti-monopoly law were held *not* to have been rendered unenforceable by the enactment of the Sherman Act by the federal government. Although the Court was dealing with a question of interstate commerce, where it conceded that federal law would prevail "If there should be a conflict between the State law and the federal law," the Court warned, in language which is appropriate here (pp. 265-266).

"A State Court should be thoroughly convinced before it abandons jurisdiction over subjects that historically have been within the competence of the State, lest it discover later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty. We should be assuming a heavy responsibility if we were to take the position that the great existing mass of State legislation to which we have referred is, and ever since 1890 has been, so limited in practical usefulness."

It should be noted that although Congress acted in 1951 to remove the favored income tax-exempt status its own tax policies had granted to savings banks and savings and loan associations (Revenue Act of 1951, § 313), it has not acted to remove the protection afforded to potential depositors in mutual, non-stock, institutions by a statute like section 258, subd. 1, of the Banking Law. We do not believe that Congress will act to do so, without weighing the possibilities of public deception against the minor disadvantage to national banks of using non-misleading substitutes for the words "saving" and "savings" in their advertising.

(1)

On the contrary, many significant provisions of the National Bank Act (12 U. S. C. A., ch. 2, §§ 21-213) indicate a firm determination upon the part of Congress to have national banks exercise their federally-granted powers in the States in which they are located in a manner which will not conflict with the standards which govern state-chartered banks.

The intention of Congress to place national banks generally on a basis of simple equality with competitive state institutions was recognized in *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 564-5. Where Congress has intended to confer exceptional powers on federal banks to enable them to compete more effectively, it has expressly done so. See *Missouri ex rel. Burnes National Bank v. Duncan*, 265 U. S. 17; and *First National Bank v. Bellows*, 244 U. S. 416, relating to the power of a national bank to act as a fiduciary.

Examples of the Congressional policy *not* to deviate from state standards of conduct may be found in various provisions of the National Bank Act:

1. National banks are authorized to establish and operate new branches "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question" (12 U. S. C. A., § 36, subd. 1). Such a provision, of course, indicates a purpose to place national and state banking systems upon an equal competitive plane. *Rushton, etc. v. Michigan Nat. Bank*, 8 Mich. 417, 299 N. W. 129, 136 A. L. R. 458.
2. A national bank is empowered to make contributions to charitable instrumentalities only "if it is located in a State the laws of which do not expressly prohibit State banking institutions from contributing to such funds or instrumentalities" (12 U. S. C. A., § 24; paragraph Eighth").

3. National banks are authorized to transact their "general business" only in the place specified in its organization certificate; and for jurisdictional purposes, are deemed to be citizens of the state in which they are located (12 U. S. C. A., § 81). *National Bank v. Phoenix Warehousing Co.*, 6 Hun 71; *Starr v. Schram*, 143 F. 2d 561.

4. The rate of interest which a national bank may charge is limited to "interest at the rate allowed by the laws of the State where the bank is located," subject to a specified exception (12 U. S. C. A., § 85). In construing the effect of this provision, it was held in *Union Nat. Bank v. Louisville, etc. R. Co.*, 163 U. S. 325, that while the right of a national bank sprang from an Act of Congress, it was (p. 331):

"only a right to have an equal administration of the rule established by the state law."

In the *Union National Bank* case, the Court further held that such right (p. 331):

"does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law; only the right to see that such rule is equally enforced in favor of national banks."

5. National banks are authorized, upon the deposit with them of public moneys of a State or political subdivision thereof, to give security for the safekeeping and prompt payment thereof, only "of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the State." *Loughman v. Town of Pelham*, 126 F. 2d 714; 12 U. S. C. A., § 90.

6. Actions by a receiver of a national bank for stock assessments and to recover debts owed to the bank are

governed by the law of the state in which the bank is located. *Tobin v. Hymers*, 99 F. 2d 740; *Nagle v. Herold*, 30 F. Supp. 905; 12 U. S. C. A., § 192. A similar rule exists as to actions against receivers of national banks. *First Trust & Savings Bank of Oneida v. Kent*, 119 F. 2d 151, cert. den. 314 U. S. 648. Receivership dividends to creditors of a national bank are, of course, distributable pursuant to federal statute. 12 U. S. C. A., § 194.

7. In matters relating to taxation, Congress has enacted an express and specific prohibition against a particular type of discrimination prohibiting the various states from taxing national bank shares at a rate higher than that imposed by the states on "other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." R. S. § 5219; 12 U. S. C. A., § 548. *Tradesmens National Bank v. Tax Comm.*, 309 U. S. 560; *First National Bank v. Hartford*, 273 U. S. 548.

Congressional policy has been to equip national banks with the power *fairly* to meet competition arising in the various states. In some matters Congress has specifically endowed national banks with special powers. But Congress has nowhere indicated any policy to permit national banks to compete *unfairly*. It has not sanctioned *unfair* competition by national banks.

(2)

Section 24 of the Federal Reserve Act (12 U. S. C. A., § 371), relied on by the defendant as the statutory basis for their claim of impairment of the powers of a federal instrumentality, does not purport to grant to any national bank the power to advertise, using the words "saving" or "savings," or to pass itself off otherwise as a state-organized savings bank.

Special Term, at one part of the trial, recognized (1758):

"The Court: There is nothing in the Federal statute that authorizes the use of these contested

words. The use of those contested words would be by implication only."

The defendant, too, conceded that it had not expressly been given the power to use the contested words (Court of Appeals Brief, p. 17). But it seeks to pile inference upon inference. And after implying the power to advertise, which is not expressly granted, but which we concede, it seeks to imply further the power to advertise in a particular way—by the use of certain words, even though the use of those words is regarded by New York as deceptive when used by other non-mutual savings institutions. But section 24 of the Federal Reserve Act (sometimes referred to below and herein as section 371, by reason of its numbering in 12 U. S. C. A.) does not justify any such double inference.

Section 24 sets forth certain of the powers of national banks and other federal reserve member banks. Listed among these are the powers, and the restrictions thereon, of national banks to lend money on farm lands and improved real estate. The section also continues the power of national banks to "receive time and savings deposits," thereafter as theretofore, and restricts the power of national banks to pay interest thereon to the rate payable by state banks.

Nothing in the phraseology of Section 24 or of any other provision of the Federal Reserve Act, or of the National Bank Act, indicates a federal purpose to empower national banks to solicit or receive savings deposits by means of misleading representations or advertising. Whether "savings" deposits be deemed to be simply a type of "time deposit" (as defined by the Federal Reserve Board pursuant to section 19 of the Federal Reserve Act, 12 U. S. C. A., § 461) or a type of deposit, independent in character from "time deposits", the pertinent Congressional provisions simply do not authorize national banks to advertise their power to *receive* such deposits in language which is misleading.

Both Section 19 (12 U. S. C. A., § 371b) and Section 24 of the Federal Reserve Act indicate a congressional intent to respect local conditions in the various states. Section 24, just as the National Bank Act does (see 12 U. S. C. A., § 85, *supra*, p. 88), prohibits national banks from paying interest at a higher rate than that permitted to be paid by State law. And Section 19 (12 U. S. C. A., § 371-b) directs the Board of Governors to regulate interest rates payable on time and savings deposits "subject to different conditions by reason of different locations", etc.

(3)

The avowed purpose of Congress, in amending Section 24 of the Federal Reserve Act in 1927, was to extend the power of national banks to make secured loans upon real estate. The clarification in 1927 of the national bank power "hereafter as heretofore" to "receive" savings deposits did not authorize national banks to advertise in a manner theretofore and since regarding as misleading in New York.

Section 24 of the Federal Reserve Act, as originally enacted in 1913, dealt only with the power of national banks to make "Loans on Farm Lands." It permitted such loans only to the extent of 25% of a national bank's capital and surplus *or to one-third of its time deposits*. It also stated that such banks might "continue hereafter as heretofore to receive time deposits and to pay interest on the same" (38 Stat. 273).

In Section 19 of the original Federal Reserve Act "time deposits" were expressly stated to comprise "all deposits payable after thirty days, and all *savings accounts* and certificates of deposits *which are subject to not less than thirty days' notice before payment.*" (38 Stat. 270, italics supplied.) The Act specifically stated that time deposits should be so "construed." (Federal Reserve Act, § 19.)

The amendment in 1927 of section 24 of the Act to state that national banks might continue to receive "time and

savings deposits and to pay interest on the same" was a clarification only of the extent of the power of national banks to "*receive savings deposits.*" National banks had been extensively engaged in the business of receiving such pass book evidenced *interest-bearing* deposits. The amendment simply made it clear that national banks could continue to do that sort of business and eliminated any doubt that deposits of that type might be included in the base for computation of the aggregate permissible amount of loans which a national bank might legally make on the security of real estate. Indeed, "savings deposits", as distinguished from "time deposits", were made an alternative base for computing the maximum amount of real estate loans which might be made by a national bank (44 Stat. 1232).

The appellant and the Government have completely overlooked the fact, that even when Congress clarified the extent of the power of national banks to receive "savings deposits," that power was stated in terms that restricted national banks to receiving such deposits "hereafter as heretofore." Conformity to the existing *practices of national banks* in the States of their location was indicated as the basis for future national bank practice, rather than uniformity. And in New York, national banks have governed their practices accordingly.

The specification in the 1927 amendment to section 24 of the Federal Reserve Act of the power to receive "savings" deposits, as well as those defined as "time" deposits (which sometimes is defined to include "savings" deposits) merely eliminated doubts as to the power of national banks

³³ Amendments to section 24 have increased the powers of national banks to make loans secured by real estate, so that the loans are now no longer restricted to farm lands, but also may be made on improved real estate. Limits have been set as to the maximum amount of any individual loan permitted upon such security. And higher limits than originally permitted have been fixed as to the *aggregate* amount of such loans which a national bank may make. (See 12 U. S. C. A., § 371.)

receive "savings" deposits.³⁴ It did not authorize national banks to carry on the portion of their business dealing with the receipt of "savings deposits" without regard to the existing standards of honest business dealing in the States in which they were located.

Congressional reports and discussion of the 1927 amendment contain no affirmative support for the appellant's position. On the contrary the House Report (No. 83, 69th Cong., 1st Sess.) sponsoring the National Bank Bill of 1927 stated that the general purpose of the bill was to adjust national banking laws to modern banking conditions (p. 2):

"along the lines of conservative banking, and without any deviation from the high standard which has been set by the national banking system."

The bill's sponsors stated that it extended national bank charters for an indefinite term of years, clarified certain of their investment powers and enabled them to establish branch banks.

The sponsors of the bill labeled section 16 of the bill, which amended section 24 of the Federal Reserve Act (and which included the provision, among others, continuing hereafter or heretofore" the power to "receive" savings deposits) merely as a

"restatement of the existing law relating to loans by banks upon the security of real estate,"

which broadened such powers only "as to the time limit on loans upon city property" while "at the same time" it made "restrictions by way of definitions." *The section increased from one to five years the length of loans upon first mortgage which a national bank was empowered to*

³⁴ Even the 1939 opinion of the Comptroller of the Currency upon which the appellant and the Government rely so heavily indicates that the "doubt" existing prior to 1927 concerned the power of national banks to "receive" deposits of the "savings" type (See page 10 of the Opinion, annexed to the Appellant's Statement of Jurisdiction).

make. The section also limited such loans to an amount not exceeding one-half of the savings type deposits in a national bank. In effect, the sponsors of the bill stated that it had become necessary to recognize:

“the right of a national bank with certain definite restrictions to use these funds in the same general manner in which the state banks and trust companies are using them, which includes the right to make loans upon city property.”

Returning to the general purposes of the 1927 National Bank Bill, its sponsors stated that they sought to give national banks rights to place them “more nearly on a par with state member banks,” state member banks meaning, of course, members of the federal reserve system. It is clear from a reading of the entire report that it was not the purpose of Congress by any of the 1927 amendments to empower national banks to engage in a type of advertising which was prohibited, as misleading, even to state banks which were federal reserve bank members.

In the floor discussion of the bill, Chairman McFadden of the Senate Committee sponsoring the bill indicated no purpose to obliterate safeguards which had been erected by any State to protect the identity of its own institutions. Far to the contrary, in the only discussions which concerned even the problem of requiring *segregation* of the different types of deposits receivable by a national bank and their investment, Mr. McFadden indicated that the Committee “did not feel that it was desirable at this time to consider that subject in connection with this bill” (67 Cong. Rec. 2833).³⁵

Special Term appears to have been misguided to some extent by the 1915 opinion of counsel to the Federal Re-

³⁵ In this connection, Senator McFadden mentioned specifically only the California practice of “departmental banking.” No reference was made to New York’s savings’ bank system or to our State’s statutes or practices.

Board, in coming to its conclusion that Section 24 amended to give national banks the power to use the "savings" in its advertising (R. 671). The opinion is not with Section 258, but with a California statute, the power of California to enforce a *penalty* against a national bank, and related to a departmental banking situation.³⁶ Moreover, Special Term failed to note that the Counsel to the Treasury conceded that even in the California departmental banking situation national banks could not be permitted to "advertise themselves 'as savings banks' since they are not so designated in the Act."

Congressional discussion of the 1927 amendment contained several colloquial references to the "savings" business which had been conducted by national banks; but they need not be attributed any great weight. Congress, neither in its 1927 legislation nor in any subsequent statute, has seen fit to overcome the objection made in the 1915 Federal Reserve Board opinion. It never deemed it proper to designate national banks as "savings banks."

Reference to the California statute is misleading. California's law and policy as to savings banks is radically different from New York's. Savings banks in California are not even mutual institutions and are not restricted, as are New York savings banks, to saving deposits. In California all banks appear to be stock corporations which may do a commercial banking business and receive certificates to do business as "savings banks." Deering's Cal. Code, 1900, 1100 and 3394.

On the subject of administrative construction by the Federal authorities, the appellant has failed to call to this Court's attention the fact that the State of California did not accept as correct the interpretation of Federal Reserve Counsel as to the meaning of Section 4 of the Federal Reserve Act. Indeed after publication of the Federal Reserve Counsel's opinion in 1915, the attorney for the California Banking Board submitted a brief to the Federal Reserve Board indicating a contrary opinion. Paton's Digest (1926 Ed.), § 637a, p. 1226.

It should be noted, too, that this early edition of Paton's Digest, lending support to the appellant's position, cautioned national banks that the propriety of the use of the word "savings" would be positively settled until decided by the court of last resort." Paton's Digest (1926 Ed.), Vol. 1, § 637, p. 101.

Far greater significance must, we submit, be accorded *the practice of national banks in New York, thereafter as theretofore*, to continue to respect the provisions of section 258 of the New York Banking Law. In any event, Congress may not be deemed to have indicated any intention, in its 1927 legislation, to clarify any doubts existing in the various States as to proper methods of advertising by national banks, since Congress merely continued the power of national banks to "receive" savings deposits "as heretofore."³⁷

4. No federal administrative action has been taken which could override the New York substantive law.

Action of the Comptroller of the Currency even in approving the *name* of a bank has been held not to be so conclusive as to justify its use where it would lead to public confusion. In *Middletown Trust Co. v. Middletown National Bank*, 110 Conn. 13, 147 Atl. 22, a national bank was enjoined from using a confusing name even though it had previously been approved by the Comptroller of the Currency.

³⁷ The national bank practice in New York (Deft's Court of Appeals Br., p. 21, top 2 lines) of continuing to respect the provisions of section 258, also belies the appellant's contention that the purpose of the 1927 amendment to section 24 of the Federal Reserve Act was to enable national banks to use the word "savings" in their advertising. See *Madruga v. Superior Court of California*, U. S. , decided January 18, 1954. The *practical construction* by national banks in New York of section 24 is best shown by their non-use of the words in issue.

Appellant's presentation of the case to the Court of Appeals was itself misleading when it sought to have the Court act favorably to it upon the assumption that the "rulings" of the Federal Reserve Board and the Comptroller of the Currency "have been consistently adhered to and followed for 38 years, with no dissent" (Deft's Court of Appeals Brief, p. 27). In view of the *actual practical construction of the federal statute by national banks* in New York, cognizant of what had been their prior practices, the 1915 ruling of the Federal Reserve Board and the 1939 Opinion of the Comptroller of the Currency were entitled to little significance.

Moreover, we believe it has been the practice of the Comptroller of the Currency *not* to approve names including the word "savings" for national banks located in *New York*. The Government's brief contains nothing to indicate that we are in error in this regard.

Even if a Federal administrative agency had expressly sanctioned defendant's use of the word "savings", such action would not be controlling upon the New York courts. In *Regents v. Carroll*, 338 U. S. 586, the Court sustained a state court judgment for breach of a contract, whose rendition the Federal Communications Commission required as a condition precedent to the granting of a license to the Georgia Board of Regents to operate a radio station. It held that the judgment of the state court did not contravene the Supremacy clause of Article VI of the Constitution (p. 596). In so holding the Court cited with approval its earlier decision in *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, where the Court had concluded the power of the Nebraska Court to adjudicate conclusively a claim of fraud in the transfer of a radio station. Referring to its decision in the *Radio Station* case, the Court stated (338 U. S. 586, 599-600):

"In the WOW case, the Commission had not passed upon the question of fraud, but if at the time of the state adjudication there had been a finding by the Commission that the facts did not justify a refusal to transfer the license, this finding would not have affected the right of the state court to determine independently the issue of fraud."

It continued (p. 602):

"We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others."

Also, too, in the instant case, the Federal Reserve Act may not be read to deprive New York of its power to protect its citizens from misleading advertising.

In any event, the Federal Government has not promulgated any regulation which purports to govern the *advertising* of national banks. Federal Reserve regulations "D" and "Q", do not do so. So far as pertinent here, they simply *define* time and savings deposits for certain specific purposes of the Federal Reserve Act.

The defendant appears to have abandoned its reliance upon the recent Circuit Court decision in *United States v. Manufacturers Trust Company*, 198 F. 2d 366. The *Manufacturers Trust Company* case dealt with a "special interest" account in a state bank. It held that the government in seeking to collect taxes from a delinquent taxpayer out of funds on deposit in a "special interest" account was not prevented from exerting its rights as a creditor by the provision of Federal Reserve Regulation "Q" prohibiting withdrawals from a passbook account "without presentation of the passbook." The Court wrote (p. 368):

"* * * the regulations of the Board of Governors of the Federal Reserve Board cannot abrogate the power of the Treasury to enforce the collection of taxes. Cf. 12 U. S. C. A., § 246. And, there is nothing to make reasonable any conclusion that they were so intended."

Likewise, neither Federal Reserve Regulation "D" nor "Q" may abrogate the salutary provisions of Section 258 of the New York Banking Law. Nor do they contain any words to make reasonable any conclusion that they were so intended.

Federal policy to respect New York State's prohibition against the use of the word "savings" by non-savings banks is exhibited, as a matter of fact, in Operating Circular No. 15 of the Federal Reserve System, dated December 8, 1947. This operating circular was offered

in evidence as exhibit "W" by the respondent. Footnote No. 2 of the circular states:

"Since the use of the word 'saving' and 'savings' are restricted by statute in the State of New York, the term 'thrift deposit' is used to describe deposits conforming to the definition of the term 'savings deposits' in Regulation Q."

The State does not here challenge the general power of the defendant or any other national bank to receive passbook-evidenced interest-bearing time deposits or their implied power to advertise. It seeks, however, to prevent the defendant, as it would any other national or state commercial bank, from using its implied power to advertise in a deceptive fashion—because the use of words "Saving" or "savings" by a bank which is not a "savings bank", as defined by Article 6 of the Banking Law, is likely to deceive and mislead the public.

(4)

The power granted to national banks to receive "savings deposits" does not carry with it, by implication, a privilege to use the words "saving" or "savings", in advertising, when such usage has been found by a State Legislature to be misleading. Congress has not clearly manifested any intention to exclude such an exercise of the police power.

(A)

As was clearly stated in *Colorado Bank v. Bedford*, 310 U. S. 41, 48:

"We may assume that national banks possess only the powers conferred by Congress."

The power should not be implied from the provisions of section 24. *First National Bank v. Missouri*, 263 U. S. 640; *Yonkers v. Downey*, 309 U. S. 590, 597. See also *Board of Comm'rs v. U. S.*, 308 U. S. 343, 352.

We argue against *implying* such a power to advertise or solicit deposits *deceptively*, since the State prohibition is directed, without discrimination against State and national banks alike; and particularly in view of the policy displayed by Congress, throughout the National Bank Act and again in the Federal Reserve Act, to respect local law with regard to maximum interest rates, branch banking, charitable contributions and other matters (See *supra* pp. 87-89, esp. *Union Nat. Bank v. Louisville*, 163 U. S. 325).

In *First National Bank v. Missouri*, 263 U. S. 640, it was held by this Court that the State of Missouri had constitutionally applied to national banks its prohibition against the maintenance of branch banks, Congress not having theretofore expressly granted to national banks the power to establish branch banks.

The Court rejected the argument advanced by the national bank that the establishment of a branch bank was the exercise of an "incidental power" conferred by section 5136 of the Revised Statutes (12 U. S. C. A., § 24). It set forth this principle for determining whether a power might be deemed an "incidental power" of a national bank (p. 659):

"Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted."

In arriving at its conclusion that the "purpose" for which the national bank had been created was not being interfered with or its efficiency impaired by the Missouri statute, the Court wrote (p. 659):

"This conclusion would seem to be self-evident but if warrant for it be needed, it sufficiently lies in the

fact that national banking associations have gone on for more than half a century without branches and upon the theory of an absence of authority to establish them. If the non-existence of such branches or the absence of power to create them has operated or is calculated to operate to the detriment of the government, or in such manner as to interfere with the efficiency of such associations as federal agencies, or to frustrate their purposes, it is inconceivable that the fact would not long since have been discovered and steps taken *by Congress* to remedy the omission." (Italics supplied.)

How pertinent that observation is in the instant case!

Tiffany v. National Bank, 18 Wall. 409, is not an authority for such an implication of power. The decision in that case depended upon the *express provision* of the National Bank Act which authorized national banks to take, receive, *reserve or charge* interest on loans (p. 411):

"* * * at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the Act."

The *Tiffany* case, on the contrary, is simply another judicial recognition of Congressional policy to have national banks conform to and obtain the advantages of the laws in the States in which they are located, in the absence of a Congressional direction to the contrary. Thus, Congressional policy has been to make the determination of whether national bank transactions have been usurious one of State law, but Congress has itself fixed uniform and exclusive *penalties* to be imposed upon national banks

for usurious transactions. *Farmers' etc. Nat. Bank v. Deering*, 91 U. S. 29.³⁸

The Congressional policy to have State law govern the determination of whether transactions by national banks are usurious (and so contravene state standards of fair business dealing) is particularly well illustrated, for the purposes of this case, by *Citizens' National Bank v. Donnell*, 195 U. S. 369, where a national bank was held to have engaged in a usurious transaction by compounding interest in an unlawful manner even though the total interest amounted to less than the maximum rate permitted by the State. Justice HOLMES, for a unanimous Court, wrote (p. 374):

"Even if the compounded interest is less than might be charged directly without compounding, a statute may forbid enlarging the debt in that way, whatever may be the rules of the common law. The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the state court. *Union National Bank v. Louisville, New Albany & Chicago Ry.*, 163 U. S. 325, 331."

(B)

Furthermore, such a power should not be implied from the provisions of section 24 of the Federal Reserve Act, or as an incidental power since the intention of Congress to exclude States from exerting their police power must

³⁸ No attempt has been made by New York in this suit to recover against the Bank the penalty provided for in section 258 of the Banking Law.

be clearly manifested.³⁰ *Napier v. Atlantic Coast Line*, 272 U. S. 605, 611 and cases there cited; *Allen Bradley Local v. Board*, 315 U. S. 740, 749, and cases there cited; *People v. County Transportation Co.*, 303 N. Y. 391. As was stated in *Maurer v. Hamilton* (309 U. S. 598, 614):

“As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred *unless clearly indicated* by those considerations which are persuasive of the statutory purpose.” (Italics supplied.)

³⁰ Nor is there any such clear manifestation in the provisions of the statute governing the Federal Deposit Insurance Corporation (12 U. S. C. A., § 1811 *et seq.*). On the contrary, Special Term, when it referred to federal deposit insurance (R. 670), failed to note that very specific provisions governing that Insurance Corporation indicate a purpose to continue to recognize State-established distinctions between different types of banking institutions rather than to divest mutual savings banks and other savings banks of their identity (§§ 1813, f and g).

Before the Appellate Division, defendant's argument became the rather cynical one that legislation designed to protect a potential depositor from being misled in the exercise of a choice of a bank no longer served a useful purpose; and that it did not matter whether banking institutions resorted to *deception* in their solicitation or advertising since the depositors now have some insurance protection against loss in the event of bank failure. We believe this argument is not only cynical but unsound. Federal deposit insurance was not designed to obliterate the distinctions between various types of banks, insured or uninsured, nor was it designed to encourage *deception in the procurement of deposits*. Furthermore, we do not believe that the Federal Government by providing federal deposit insurance intended to wipe out the dual banking system (state and national) which has so long endured in this country; or that any Court giving the matter mature consideration will conclude that the deposit insurance corporation should be regarded as a substitute for statutory safeguards against banking misconduct.

Moreover, federal deposit insurance is made available by a deposit insurance corporation rather than by the Government itself. The assets of the Treasury are not generally available to meet the insurance contracts of the deposit insurance corporation. The annual

(Continued on following page)

POINT IV

Section 258, which is non-discriminatory, since it applies to State-chartered banks as well as to national banks, is constitutional. It does not violate the supremacy clause of the Federal Constitution.

(1)

The decision at Special Term amounted to an extension of the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316, to defeat a proper exercise of New York's police power. Such an extension of the *McCulloch v. Maryland* doctrine completely ignored this Court's retreat from the absolute statements of the *McCulloch* case even in the field of its origin—State taxation of federal instrumentalities.

In *Oklahoma Tax Comm. v. Texas Co.*, 336 U. S. 342, this Court unanimously held that a lessee of mineral rights in allotted and restricted Indian lands in Oklahoma had no immunity under the Federal Constitution from non-discriminatory state gross production taxes and state excise taxes on petroleum produced from such lands, Justice Rutledge said (p. 352):

“It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its for-

(Continued from preceding page)

report of the Federal Deposit Insurance Corporation, for the year ended December 31, 1951, showed at that time total assets of \$1,360,345,176.10 for the corporation as against total liabilities of \$78,157,227.72, leaving available a deposit insurance fund of \$1,282,187,948.38 to insure deposits. Insured deposits totaled \$92,531,000,000 as of September 19, 1951. It should be noted too, that the total deposits in all insured banks in the United States, as of September 19, 1951, amounted to \$170,499,000,000. It is thus obvious that a substantial portion of deposits even in insured banks is not covered by federal deposit insurance. Our own record on appeal shows that the defendant maintained even among its so-called “savings accounts,” deposits in excess of the \$10,000 amount insured by the federal corporation (R. 37).

merly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.

“Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point, together with later ones deviating in rationale. It is of substantial importance both for the states’ powers of taxation and for the subjects on which they may impinge. Moreover, even though the immediate questions are closely related to federal policies concerning Indian lands, they are equally tangent to considerations affecting other types of situations raising questions of immunity.”

In *New York v. United States*, 326 U. S. 572, where the tax sustained was a non-discriminatory federal tax imposed on mineral waters, from which the State of New York sought immunity, Justice Frankfurter wrote (p. 81):

“In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity.”

In *Graves v. N. Y. ex rel. O’Keefe*, 306 U. S. 466, the Supreme Court held that the salary of an employee of the Federal Home Owner’s Loan Corporation, a federal instrumentality, was constitutionally subject to non-discriminatory taxation by the State of New York, in which the employee resided.

Reexamination of the immunity concept set forth in *McCulloch v. Maryland* had been commenced at least as early as *Helvering v. Gerhardt*, 304 U. S. 405, where this Court held that the salary of an employee of the Port of New York Authority was *not immune* from federal taxation. Justice Stone there noted (p. 411):

"The Constitution contains no express limitation on the power of either a state or the national government to tax the other, or its instrumentalities. The doctrine that there is an *implied* limitation stems from *McCulloch v. Maryland*, 4 Wheat. 316, in which it was held that a state tax laid specifically upon the privilege of issuing bank notes, and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, *implied* as an incident to the borrowing, taxing, war and other powers specifically granted to the national government by Article I, § 8 of the Constitution." (Italics supplied.)

Analyzing the decision in the *McCulloch* case, Justice Stone observed (p. 413):

"It was perhaps enough to have supported the conclusion that the tax was invalid, that it was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress of a national power. Such discrimination was later recognized to be in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities. *Miller v. Milwaukee*, 272 U. S. 713; cf. *Pacific Co., Ltd. v. Johnson*, 285 U. S. 480, 493."

Turning from a discussion of the *McCulloch* doctrine to the corollary doctrine expounded in *Collector v. Day*, 11 Wall. 113, that *state* instrumentalities were immune

from federal taxation, Justice Stone further remarked (p. 5):

"It is enough for present purposes that the state immunity from the national taxing power, when recognized in *Collector v. Day*, *supra*, was narrowly limited to a state judicial officer engaged in the performance of a function which pertained to state governments at the time the Constitution was adopted, without which no state 'could long preserve its existence'."

Justice Stone then went on to set forth "cogent reasons why any constitutional restriction upon the taxing power granted to Congress, so far as it can be properly raised in implication, should be narrowly limited" 304, U. S. 5, 416).

As a basis for the decision denying immunity from taxation, Justice STONE wrote (pp. 421-422):

"The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end *it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government*. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage." (Italics supplied.)

So, in the instant case, it is not essential to the preservation of the national government that national banks be given a competitive advantage over state commercial banks and trust companies—a privilege of using words in their advertising which the State has found likely to prove deceptive and misleading. That is an unfair "competitive advantage" which, we submit, the federal constitution does not guarantee to national banks.

The recent trend has been to *restrict* immunity from taxation as the foregoing cases demonstrate. *McCulloch v. Maryland* may, therefore, not be relied upon, as it was by Special Term, as an absolutely unrestricted doctrine. This Court, of course, will not *completely overlook* the cases it decided in the period from *Helvering v. Gerhardt* (304 U. S. 405) to *Esso Standard Oil Co. v. Evans* (345 U. S. 495).

This trend against implication of immunity has not been interrupted by the decisions in *Pitman v. H. O. L. C.*, 308 U. S. 21; *Maricopa Co. v. Valley National Bank*, 318 U. S. 357, or in *City of Cleveland v. United States*, 323 U. S. 329. In each of those cases, immunity was *expressly* granted by Act of Congress. In the *Pitman* case, Congress had *expressly* provided that H. O. L. C. loans should be exempt from all state or municipal taxes. In the *Maricopa Co.* case, Congress had specifically withdrawn the privileges of taxing national bank stock held by the Reconstruction Finance Corp. and in the *City of Cleveland* case, the statute had specifically exempted from taxation property of the Federal Public Housing Authority. Moreover, the Court's very recent decision in *Kern-Limerick, Inc. v. Scurlock*, — U. S. —, decided February 8, 1954, depended upon a determination that the persons taxed by Arkansas were empowered, under the Armed Services Procurement Act of 1947, to act and had acted in making the purchase taxed, upon a Navy Department "purchase order," as Government purchasing agents, which led the majority of this Court to hold that the *purchaser* had been the *Government itself*.

(2)

This reluctance to extend the doctrine of governmental immunity has been evidenced in this Court's decisions in the field of *regulation*, as well as taxation. This reluctance was noted by Chief Justice STONE in *Penn Dairies v.*

Milk Control Comm., 318 U. S. 261. He said (p. 271):

"Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U. S. 81, and cases cited; *Colorado Bank v. Bedford*, 310 U. S. 41, 53, and cases cited; cf. *Baltimore National Bank v. Tax Commission*, 297 U. S. 209."

In the Penn Dairies case, it was held that the minimum price regulations of the Pennsylvania Milk Control Law could constitutionally be applied to the sale of milk by a dealer to the United States Government. The Court wrote (p. 278):

"We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity."

In arriving at its decision, the Court specifically called attention to the trend of its decisions not to extend governmental immunity from state taxation and regulation (318 U. S. 261, 270):

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents."

(3)

In the determination of what constitutes an unconstitutional "burden" on the national government, this Court has recognized that the coexistence of state and national governments necessarily imposes some burdens on the national government of the same kind as those imposed on citizens within the State's borders. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 523-4; *Penn Dairies v. Milk Control Comm.*, 318 U. S. 261, 270-271. We deem worthy of quotation Justice STONE's statement on the subject in the *Penn Dairies* case (pp. 270-271):

"We have recognized that the Constitution presupposes the continued existence of the state's functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy v. Mitchell*, *supra*, 523-24. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483, 487."

In the related task of determining what might constitute an unconstitutional "burden" on interstate commerce, this

Court, dealing with the validity of the Blue Sky Law of the State of Michigan, had occasion to state, in *Merrick v. Falsely & Co.*, U. S. 568, in discussing the burdens of the Michigan statute (p. 587):

"It burdens honest business, it is true, but burdens it only that under its form dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby caused and inconvenience, but to arrest the power of the State by such considerations would make it impotent to discharge its function. It costs something to be governed."

In sustaining the Blue Sky Law of Michigan, this Court did not hesitate to rely upon its earlier decision in *Engel v. Malley*, relating to the business of banking. It stated (p. 588):

"*Engel v. O'Malley*, 219 U. S. 128, was not decided because fraud was incidental to the business of banking by individuals or partnerships but because fraud could be practiced in it and that hence it could be licensed."

In dealing with the argument in *Hall v. Geiger Jones*, 2 U. S. 539, that the Blue Sky Law of the State of Ohio was an unconstitutional burden on interstate commerce, this Court held that the statute was a valid police power regulation, which affected interstate commerce "only incidentally" (p. 558) and, in so holding stated (p. 557):

"There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation but it may imply permission of such legislation. In other words, *the burden of the legislation*, if it be a burden, *may be indirect and valid in the absence of the assertion of the national power.*" (Italics supplied.)

This Court noted that the mere "inconvenience" caused by the regulatory legislation was insufficient to warrant a holding of unconstitutionality. Such "inconvenience", it held "must yield to the public welfare" (242 U. S., at p. 552). We may note, parenthetically, that laws designed to prevent fraud have been sustained, not only when they cause *inconvenience*, but even where they interfere with freedom of contract (*McLean v. Arkansas*, 211 U. S. 539, 550).

In *Colorado Bank v. Bedford*, 310 U. S. 41, this Court held valid a Colorado statute laying a percentage tax on the users of the safe deposit services of banks even though the statute required national banks, among others, to collect and remit such taxes to the State. The Court sustained both the tax on the bank's customers and the requirement that the bank collect and remit the tax as not imposing an unconstitutional burden on a federal instrumentality.

See *National Bank v. Commonwealth*, 9 Wall. 353. See also *Des Moines Bank v. Fairweather*, 263 U. S. 103, 111, cited in Justice REED's opinion (310 U. S., pp. 51, 53). And see, particularly, *Abilene Nat'l Bank v. Dolley*, 228 U. S. 1, where it was held that police power measures taken to make state banks popular and safe were not unconstitutional as to national banks, even though they made the competitive situation of national banks more difficult. Mr. Justice Holmes further stated, as to national banks (228 U. S., at p. 4):

"They cannot retain the advantages of their adverse situation and share those of the parties with whom they contend. The statutes of the United States when they do not attempt to prohibit competition with national banks do not forbid competitors to succeed."

In *Tradesmens National Bank v. Tax Comm.*, 309 U. S. 560, it was held that Congress might constitutionally auth-

prize State taxation of the franchises of national banking associations. It sustained an Oklahoma tax on the net income of national banks, the measure of which included dividends on Federal Reserve bank stock and interest on tax-exempt federal securities. Without dissent, Justice MURPHY wrote for the Court (309 U. S. 560, 567):

"A consideration of the course of judicial decision on R. S. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which *discriminate* in practical operation against national banking associations or their shareholders as a class." (Italics supplied.)

On the subject of "discrimination", Justice MURPHY wrote (p. 568):

"Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations. Compare *Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, at 393; *Lionberger v. Rouse*, 9 Wall. 468."

See also:

First Nat. Bank v. Tax Comm'n, 289 U. S. 60, 64.

(4)

Cases which we have already discussed have indicated that the Supremacy Clause of the Constitution does not require the invalidation of State legislation unless it conflicts directly with the letter or policy of Congressional legislation. Accordingly, we shall here rely chiefly on a leading case applying the Supremacy doctrine.

In *Savage v. Jones*, 225 U. S. 501, Justice HUGHES for a unanimous Court, wrote (p. 524):

"The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food."

Justice HUGHES continued (p. 525):

"* * * when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

Then he quoted from the opinion in *Plumley v. Mass.* (155 U. S. 461, 468, 472):

"Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?
* * *

"Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circum-

stance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States.”

till further he stated (225 U. S. 501, 533-4):

“But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State. This principle has had abundant illustration. *Chicago &c. Ry. Co. v. Solan*, 169 U. S. 133; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Reid v. Colorado*, 187 U. S. 137; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; *Crossman v. Lurman*, 192 U. S. 189; *Asbell v. Kansas*, 209 U. S. 251; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 379; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 442.”

See also *Quaker Oats Co. v. City of New York*, 295 N. Y. 27, aff'd 331 U. S. 787, and the recent cases in the field of emergency rent control, such as *Matter of Tartaglia v. McLaughlin*, 297 N. Y. 419, 425; cf. *Teeval Co. v. Stern*, 301 N. Y. 346, 361, 365, cert. den. 340 U. S. 876.

Authorities Relied on By Special Term Distinguished.

Special Term laid great emphasis upon the holding in *McCulloch v. Maryland* (4 Wheat. 316). In an earlier portion of this point we have shown how the apparently absolute doctrine of the *McCulloch* case has been departed from even in the field in which it originated—the field of taxation of federal instrumentalities. We submit that this court's most recent decisions indicate that the *McCulloch*

doctrine does not prevent the States from exercising their regulatory functions under the police power except where State action conflicts directly with federal legislation governing the same subject or interferes with a federal instrumentality in the performance of its public function.

First National Bank v. Union Trust Co. (244 U. S. 416) simply held that Congress could in the proper exercise of its judgment grant to national banks the right to act as "trustee, executor, administrator or registrar of stocks and bonds" under such rules and regulations as the Federal Reserve Board might prescribe. It will be noted that the Act of Congress creating this power gave to the Federal Reserve Board authority to grant national banks the right to act in these various fiduciary capacities by special permit "when not in contravention of State or local law" (244 U. S. 421). But, while recognizing that Congress has the power to confer upon national banks certain functions of a private nature, the Court nevertheless stated (p. 426)

"Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulation for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers."

In *Fidelity Nat. Bank and Trust Co. v. Enright* (206 Fed. 236) a district court judge held that a national bank which had originally been a trust company organized under the laws of the State of Missouri under the name Fidelity Trust Company was entitled to use the name Fidelity National Bank and Trust Company of Kansas City, Missouri. This name had been duly approved by the Comptroller of the Currency as required by the N

tional Banking Act. The Court simply held that the Comptroller of the Currency had been given full power to approve the names of national banks. Cf. *Middletown Trust Co.* case, 110 Conn. 13.

In *Missouri ex rel. Burnes Nat'l Bank v. Duncan* (265 U. S. 17), this Court sustained the power of Congress to give to national banks the authority to act in certain fiduciary capacities whether or not trust companies competing with them had that power in the State in which the national bank was located. Justice HOLMES pointed out, quite pertinently, that Congress had "expressed its paramount will" (p. 24).

In *First Nat'l Bank v. California* (262 U. S. 366) it was held that an escheat statute of the State of California was void as applied to deposits in national banks. The court held that California could not dissolve contracts of deposits that had been made with national banks even after twenty years and require national banks to pay to California the amounts then due. The evil which the Court sought to avoid was the modification of national banks' valid contracts, with its depositors, by each of the 48 states. The case is clearly distinguishable from the one on appeal where New York's legislation is designed to prevent any bank from obtaining deposits by misleading representations.

In *Easton v. Iowa* (188 U. S. 220), the holding was simply that Congress had dealt directly with the insolvency of national banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, with power to suspend the operations of national banks and appoint receivers thereof when they became insolvent or when they failed to make good any impairment of capital. Since Congress had dealt directly with the subject of insolvent banks, the Iowa statute, making illegal certain action by *insolvent* banks or their officers in the State of

Iowa, was held to be inapplicable to national banks. That is not the situation here where Congress has not seen fit to deal with the subject of misleading banking advertising or representations (except to protect federally-chartered institutions) or to contravene State legislation protecting the identity of a certain type of State bank.

Special Term also relied on a statement in Paton's Digest (R. 672). The erroneous premise upon which Paton's Digest (1950 Ed., p. 645), concluded that Section 258 was unenforceable against national banks was that persons intelligent enough "to know the nature of a mutual savings bank" would not make a "deposit in a national bank thinking it was a mutual savings bank." Paton recognized, however, that its position that the word "savings" could be used by national banks was subject to the condition that "the advertising will not lead persons to think that the business is that of a mutual savings bank" (p. 645). New York's Legislature, of course, was entitled to find that use of the word "savings" was likely to be misleading to intelligent, unintelligent or even to ignorant or careless persons.

Conclusion

The distinctive character of the New York *mutual* savings banks has been recognized and respected by this Court. *Mercantile Bank v. New York*, 121 U. S. 138. The New York Constitution, Art. X, § 3, requires the Legislature to protect this distinctive character by requiring a uniformity of powers, rights and liabilities for all savings banks and prohibits savings banks from having any capital stock. Section 258 simply seeks to protect persons from being misled into believing that an institution, especially a stock corporation, not possessed of this distinctive character, has it. That has been an objective of the New York Legislature since 1858.

The prohibition contained in Section 258 of the Banking Law against the use of the words "saving" and "savings" is a proper exercise of the police power, designed to prevent public deception and misleading advertising (R. 689). The record warranted the Court of Appeals and Appellate Division's findings (R. 687-690; 679-680) that the defendant's deliberate violation of the statutory prohibition, as conclusively shown by the People's evidence and the defendant's admissions, tended to mislead the public. Clearly, the Legislature did not act unreasonably in prohibiting the use of these words. *Dillingham v. McLaughlin*, 264 U. S. 370, 374.

We have been somewhat astonished by the defendant's argument (Ct. Appeals Brief, p. 20; Brief in this Court, p. 37) that since there is no specific prohibition against the misleading use of the word "savings" in the Federal Reserve Act provisions designed to prevent misrepresentation of organizations as banks organized under the laws of the United States (12 U. S. C. A., Sections 583-584), or as members of the Federal Reserve System (12 U. S. C. A., Section 586)⁴², that national banks have been given a free hand by Congress to engage in other forms of misleading advertising. We note, additionally, that the federal government has also prohibited advertising calculated to convey the impression that an organization which is not a federal home loan bank, is such an organization (12 U. S. C. A., Section 1441). But we have no doubt that New York, like the Federal Government, is entitled to prevent organizations not organized under certain provisions of its laws from misleading the public into the belief that they have been so organized. *People v. Binghamton Trust Co.*, 139 N. Y. 85.

⁴² These provisions are now combined in 18 U. S. C., § 709. The new caption "False advertising or misuse of names to indicate Federal agency" indicates Congress' purpose to be a restricted one, not entering the field of misleading advertising by a federal agency.

Congress has not, by section 24 of the Federal Reserve Act (12 U. S. C. A. 371), expressly authorized national banks to use the prohibited words in their advertising or in their dealings with the public. Nor has Congress expressly or by implication given national banks the power to advertise in a misleading fashion. There is no conflict between Section 258 of the New York Banking Law and any federal statute. On the contrary, Congressional policy, as evidenced by various provisions of the National Banking Act, is to conform the conduct of national banks to the business standards of the States of their location, except where it has expressly granted such banks some special privilege. But Congress has nowhere granted national banks any such special privilege to compete unfairly—by misleading advertising. And the federal Constitution contains no guaranty of any special privilege to national banks to deviate from State standards of fair competition.

Special Term's judgment and the reasoning upon which it was based would have left New York powerless to protect its citizens even from deliberately fraudulent and misleading advertising by a national bank; *e.g.*, advertising in which a national bank expressly stated that it was a "savings bank."

New York's Court of Appeals and Appellate Division, on the other hand, have given effect to the New York Legislature's purpose and have molded a decree which prevents the public from being misled by the use of the word "savings," without preventing national banks from competing fairly for deposits, without interfering with the internal operations of any national bank as part of the federal reserve system and without interfering in any way with the performance by national banks of any functions assigned to them by the Treasury in the sale or redemption of savings bonds.

New York's statute is directed against a form of unfair competition. The defendant should not be permitted to

imply from our federal Constitution or from an inexplicit federal statute any right to compete unfairly.

The judgment appealed from should, therefore, be affirmed.

Respectfully submitted,

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Appendix

Art. X, § 3 of the New York State Constitution provides:

Savings bank charters; restrictions on trustees; special charters not to be granted. § 3. The legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. And no such corporation shall have any capital stock, nor shall the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings. The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws. (Formerly § 4 of Art. 8. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

In 1935, a report entitled "Banking Developments in New York State, 1923-1934," prepared by the *New York State Bankers Association* "Commission for the study of the Banking Structure," then in a stage of the business cycle which made it more mindful than now of the hazards involved in having commercial banks encroach upon the functions of savings banks, observed (Chap. V, pp. 67-68):

"The Growth of Time Deposits in Commercial Banks.—The growth in capital assets has been related in a way to the growth in time deposits, which have

Appendix

now become nearly 60 per cent of total deposits in New York State commercial banks outside New York City. In the struggle of banks for size there has been keen competition for deposits, high interest rates paid on deposits, a rapid expansion of resources, and in many cases a levelling down of the quality of assets. Many institutions have paid out over 50 per cent of their gross earnings in interest on deposits, in a number of years, and the average over a period of years for the commercial banks in this State outside of New York City was over 40 per cent. Not all of these time deposits, of course, are true savings, but represent in part the conversion of slow demand deposits to time deposits. It has been difficult to distinguish sharply between the two types of deposits.

The rates paid on time deposits have frequently been as high or higher than the yields on the highest grade investments. As a result the banks have attracted savings which otherwise would have gone directly into investments or would have reached the borrower through other institutions. These competitive rates for deposits have frequently led banks to acquire loans and investments, without making sufficient allowance for the possibility of losses involved in these assets. In the course of a complete business cycle, therefore, this seemingly profitable business has frequently resulted in great net loss because insufficient reserves have been accumulated to meet the losses which inevitably arise. The predominant business of the so-called commercial banks has come to be that of bringing together the investor, in the guise of a depositor, and the borrower, rather than that of supplying short-term business credits for which there has been little demand. Conditions and developments have been such that many of our commercial banks have taken on something of the nature of investment trusts.

Appendix

We have seen, however, that in fact and in practice these time deposits are little different from demand deposits in times of stress. The real problem which faces individual banks and the whole banking system is how best to provide protection from a serious decline in asset values. The difficulty is accentuated by a lack of adjustment between assets of a long-term nature and liabilities which are payable on demand. The banks are not only guaranteeing the investment of the public's funds, but they are including in that guarantee an obligation to convert these investments into cash practically on demand. The banks assume the burden of any depreciation.

One wonders how the banks in this State might have fared during the depression if during the boom years there had not been the struggle for size, the competition for savings deposits and the high rate of interest paid to depositors. Other institutions which bring the investor and the borrower together have a liability contract with the investor which is very different from the contract the commercial bank makes with its depositors. The problem which arises is whether the commercial bank is a suitable institution or medium for the investment of this large volume of the public's funds without adjusting its policies and practices to that type of business.

Taking the savings of the people and investing them is, of course, a social service which the public demands from its financial institutions. In some communities the commercial bank is the only available institution for rendering that service. *It is a question, however, whether commercial banks have been doing a savings bank business without following the rules and standards essential in that business. The first requisite in supplying that service is to provide for the safety*

Appendix

the deposits. All other considerations, including the return to the depositor, are subordinate to that factor of safety."

The term "savings bank" has been defined in an authority (Paton's Digest, 1926 Ed., Vol. 1, Appendix, Definitions of Legal and Banking Terms, p. 37) upon which the appellant places great reliance as follows:

"In its general nature, a bank established for the purpose of receiving deposits of money to be invested for the benefit of the persons depositing, rather than of the bank, in mortgages, stocks and bonds, as distinguished from loans and discounts on personal security. Deposits are paid on presentation of passbooks instead of on checks."

FILED
OCT 22 1953

HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE OF THE NEW YORK STATE
BANKERS ASSOCIATION IN SUPPORT OF THE
STATEMENT AS TO JURISDICTION.

/ PETER KEBER,
*Counsel for the New York State
Bankers Association, Amicus
Curiae.*

DORSEY, BURKE AND KEBER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 427

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,
against

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE,
Defendant-Appellant

**BRIEF OF THE NEW YORK STATE BANKERS
ASSOCIATION IN SUPPORT OF JURISDICTIONAL
STATEMENT FILED BY DEFENDANT-APPEL-
LANT.**

This brief is submitted by the New York State Bankers Association with the written consent of both parties to the action pursuant to Rule 27 (9b) of the Rules of this Court. The consent is annexed hereto.

The New York State Bankers Association is composed of more than 650 banks and trust companies located throughout New York State. Included are 369 national banks. Believing that such banks were directly concerned, the Association filed a brief as *amicus curiae* in the Court of Appeals in which it supported defendant's position. In so doing and in here urging this Court to accept jurisdic-

tion, the Association is endeavoring to carry out its function of promoting, in the public interest, sound commercial practices. It respectfully submits that Section 258 (1) of the New York State Banking Law, as construed by the Court of Appeals, impedes such practices by seriously impairing the ability of all national banks located in New York to carry on an important phase of their business—an activity expressly authorized by the Federal Reserve Act, (Section 24; 12 USC Section 371).

The Question Is Substantial

The Association respectfully submits that a fundamental conflict exists between the authority conferred upon national banks by Section 24 of the Federal Reserve Act to receive "savings deposits" and the prohibition contained in Section 258 (1) of the State Banking Law which, as construed by the Court of Appeals, prohibits the use of the word "saving" or "savings" in its advertisements and in its banking or financial business in its dealing with the public.

A

The nature of the basis conflict is suggested by the majority opinion of the Court of Appeals which stated in substance that except for the defendant-appellant no national bank operating in New York had failed to heed Section 258 (1) of the State Banking Law and that all national banks had complied by using "synonymous expressions." It is thus indicated that acquiescence alone might establish the validity of the statute against constitutional attack. Assuming that all national banks had complied (a fact not established in the record), nevertheless, it seems clear that such compliance with a State statute does not and should not estop national banks from asserting their claim of unconstitutionality nor should

it constitute a waiver of their rights, and more particularly the right of the defendant-appellant, who has not complied, to attack the constitutionality of the statute. (cf. *Abie State Bank v. Weaver*, (1930) 282 U. S. 765, 775-6.

The mere fact that national banks have had to use what the Court of Appeals describes as "synonymous expressions" such as "special interest account," "thrift account," etc., not only has the effect of defeating the avowed purpose of Section 258 (1) of the State Banking Law if the expressions are "synonymous" but also defeats the express authority granted national banks by Section 24 of the Federal Reserve Act if the expressions are not synonymous.

It is significant, then, that the question here involved concerns not merely a single bank, to wit, defendant-appellant, as the opinion of the Court of Appeals implies, it directly affects all national banks operating in New York State.

B

A review by this Court of the judgment appealed from is indicated by the further fact that the majority opinion of the Court of Appeals contains substantial errors. Some are referred to in the jurisdictional statement of defendant-appellant and others are briefly noted below.

Thus, the Court states that use by national banks of the interdicted words is misleading because the words have reference to mutual savings banks as distinguished from commercial banks. In reaching this conclusion, the Court failed to recognize that the New York statute itself contemplates a considerably wider usage; that it permits use of the prohibited words by other types of institutions, particularly savings and loan associations, in addition to savings banks.

The allowed usage is significant because the relationship between a national bank and its savings depositors is closely analogous to that of a savings bank and its depositors, while the contrary is true in the case of savings and loan associations. Savings and loan associations do not receive deposits. They merely sell shares. Their savings accounts constitute their capital. The account holders never become creditors, only shareholders, and so, never can sue for payment as creditors. The account holders, as shareholders, vote on corporate matters, having one vote for each \$100 or withdrawal value of their respective accounts. The method of repayment is regulated by statute (New York Banking Law, Section 378; 12 USCA, Section 1464(b); Rules and Regulations of Federal Savings and Loan Associations, Chapter 1 (c), Title 24, C.F.R.).

In the case of savings and national banks, on the other hand, the relationship between the banks and their depositors is, for all practical purposes, the same. Depositors are creditors; they receive what amounts to interest on their deposits; passbooks are required in order to make withdrawals; the right to withdraw is absolute upon the giving of necessary notice; depositors have no right to vote or control management. The fact that a savings bank has no stockholders while a national bank has is of no practical consequence to a depositor. (*People v. Mechanics and Traders Savings Institution*, 92 N. Y. 7).

It is thus apparent that the restricted definition given the word "savings" by the Court of Appeals is without basis. For it is clear that there is practically no difference between the savings accounts of savings banks and of national banks; that there is, on the other hand, a wide and substantial difference between them and the savings accounts of savings and loan associations.

The majority opinion below indicates that usage by a national bank is deceptive for the further reason that nat-

al banks are operated primarily for the profit of their stockholders, while the fundamental purpose of savings banks, it says, is the protection of small depositors through caution and conservatism in investments. It is submitted that as a basis for distinguishing between the two types of banks at the present time, the proposition clearly lacks substance. As pointed out by the trial court below, since the deposits of both savings banks and national banks are insured by the Federal Deposit Insurance Corporation, the law enacted for protecting small depositors, which once existed and formed the basis for the state statute, is no longer present.

If there be any doubt that, with the insurance afforded by the Federal Deposit Insurance Corporation on savings deposits in all national banks—as on those in savings banks—savings are just as safe in national banks as in other institutions, a reading of Section 258 itself will dispel this. In sub-section 2 of Section 258, the state Legislature, by amendment in 1952, expressly provided that savings accounts of school children and philanthropic institutions may now be deposited in national banks on the same basis as they previously were in savings banks. The amendment, we submit, furnishes incontrovertible evidence that the Legislature now considers savings deposited in national banks as safe as those in savings banks and savings and loan associations.

Regarding the alleged conservatism required in the making of investments by savings banks—as distinguished, we presume, from the investment policies of national banks—the history of the governing statutes is particularly noteworthy. A review of such statutes shows that the investment powers of savings banks have been, over the years, widely broadened. In 1937 (Laws of 1937, Chap. 686) savings banks were given permission to invest in Canadian securities; in 1946 (Laws of 1946, Chap. 507) they were

authorized to invest in obligations of the International Bank for Reconstruction and Development; in 1949 (Laws of 1949, Chap. 522) they were empowered to invest in corporate interest bearing securities not otherwise eligible for investment; and in 1952 (Laws of 1952, Chap. 705) the savings banks of the state were expressly authorized to invest in the preferred and common stocks of business corporations—investments which national banks are not empowered to make.

Clearly, the conclusion of the Court so far as it is based upon the alleged caution and conservative investment policy required of savings banks, as distinguished from national banks, is without support. And the need for protecting “small depositors” from being misled by commercial banks, however great when the state law was originally enacted, obviously exists no longer.

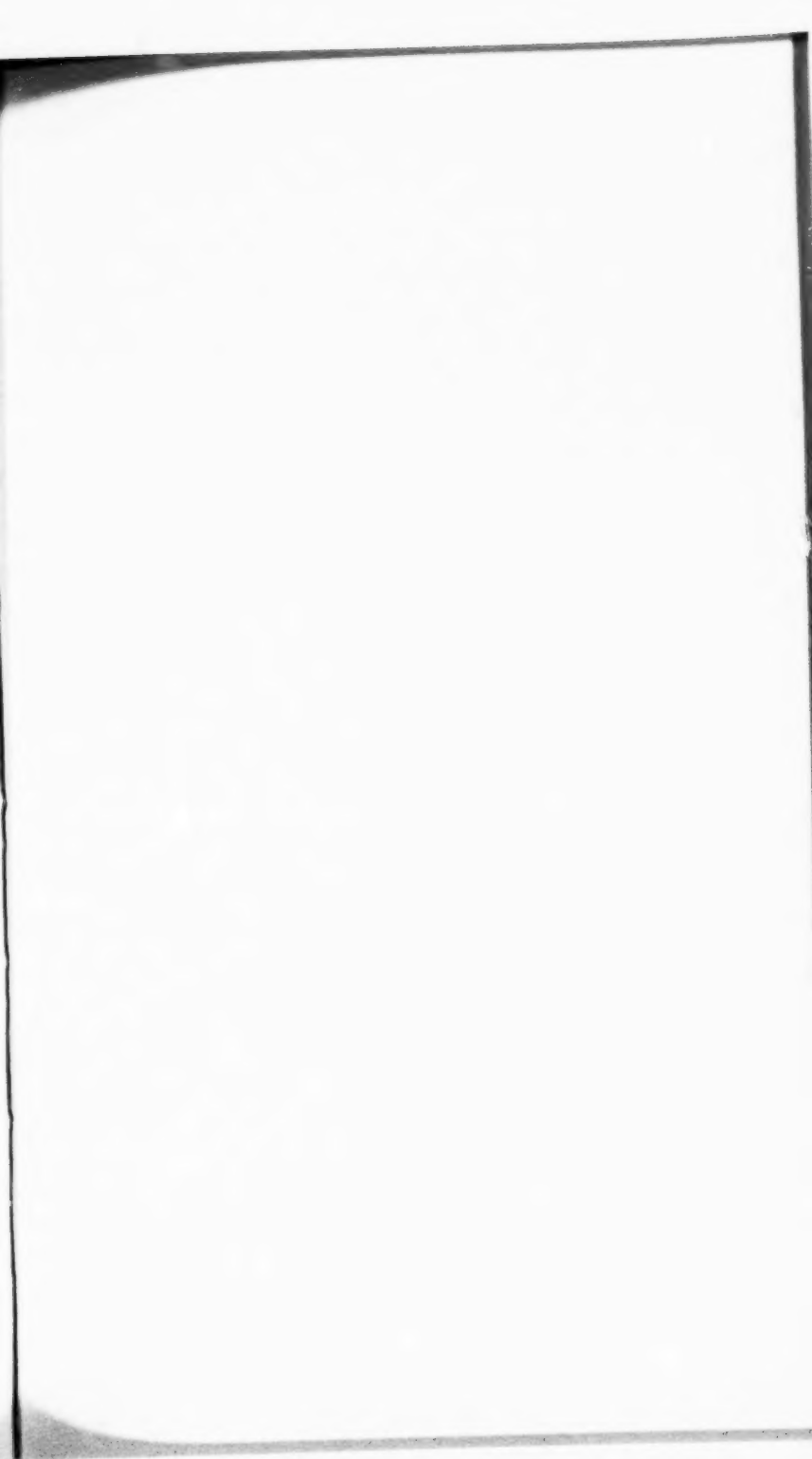
Conclusion

It is respectfully submitted that the question presented by the appeal is substantial and that this court should assume jurisdiction.

Respectfully submitted,

DORSEY, BURKE & KEBER,
*Counsel for New York State Bank-
 ers Association, Amicus Curiae.*

PETER KEBER,
Of Counsel.



In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 427

FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
APPELLANT

v.

STATE OF NEW YORK

*ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK*

MEMORANDUM FOR THE UNITED STATES AS AMICUS
CURIAE

This appeal presents the question of the constitutionality, as applied to national banks, of that portion of Section 258(1) of the New York Banking Law which prohibits the use, except by a savings bank or a savings and loan association, of the words "saving" or "savings" or their equivalent in the advertising and conduct of banking or financial business. The Court of Appeals of New York, with two judges dissenting, has upheld the validity

of this prohibition of the State statute, expressly holding that it does not contravene R. S. 5136 (12 U. S. C. 24), when read in conjunction with Section 24 of the Federal Reserve Act (38 Stat. 273, as amended, 12 U. S. C. 371). The latter section authorizes national banks "to receive time and savings deposits," while the former confers upon national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." This determination of the court below is contrary to the long standing administrative position taken both by the Bureau of the Comptroller of the Currency and by the Board of Governors of the Federal Reserve System and is patently erroneous. If allowed to stand, it will have a substantial and detrimental effect upon the national banking system as a whole. Accordingly, it is submitted that probable jurisdiction should be noted.¹

1. It is well settled that "it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." *Easton v. Iowa*, 188 U. S. 220, 238. Cf. *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283. Section 258(1) of the New York Banking Law, by prohibiting national banks from using the term "saving" or "savings" in their advertising, plainly offends in this regard.

¹ In the event that probable jurisdiction is noted, the United States intends to file a brief as *amicus curiae*, urging that the judgment below be reversed.

Congress has granted to national banks the power to receive savings deposits (12 U. S. C. 371) and has additionally granted to them the exercise of the incidental powers necessary to carry on their banking activities (12 U. S. C. 24). Realistically viewed, it can hardly be disputed that the power to advertise is an incidental power necessary to the successful conduct of the business of banking, as well as any other business. Cf. *Davis v. Farmers Co-operative Co.*, 262 U. S. 312, 315. And the power to advertise perforce includes the power accurately and adequately to describe the product or service offered. Effective solicitation is difficult, if not impossible, in circumstances where the product or service must be described in such a way as to disguise it or to deceive the public as to its true nature.²

These considerations suggest an additional reason why the New York statute, as applied by the court below, is invalid. It is clear that no state may discriminate against national banks in favor of state banking institutions. See, e.g., *Burns National Bank v. Duncan*, 265 U. S. 17; *First National*

² The majority of the court below justified the application of Section 258(1) to national banks in part on the ground that the section has a reasonable purpose—namely, the protection of the public from misleading advertising. But the section seemingly has quite the opposite effect, since it forces national banks to resort to deceptive verbiage in the solicitation of savings deposits, a practice which the majority of the court below apparently approved. 113 N.E. 2d at 799. Moreover, as the dissent below observed, it is strange indeed to characterize as deceptive or harmful advertising by a national bank which employs the very language of the act authorizing it to receive "savings deposits."

Bank v. Fellows, 244 U. S. 416. This follows from the obvious fact that if such discrimination were tolerated a state could, as a practical matter, prevent the operation of national banks within its jurisdiction. As the court below conceded, national banks and state savings banks compete with each other in so far as savings deposits are concerned. Consequently, by permitting savings banks, but not national banks, to use the words "saving" or "savings" in their advertising, Section 258(1) gives the former a substantial competitive advantage over the latter.

2. The importance of the question transcends the effect of the decision below upon national banks located within the bounds of New York. Other jurisdictions have statutes which, construed literally, prohibit the use of particular words (including in some instances the word "bank") in the title and advertising of a national bank.³ It has heretofore been the view of the federal banking supervisory agencies, and presumably that of the state authorities, that such statutes are not applicable to national banks.⁴ The decision of the court below

³ See, e.g., Cal. Financial Code Ann. (Deering 1951) §§ 3390-3395; Me. Rev. Stat., c. 55, § 5 (1944); Mass. Ann. Laws, c. 167, § 12, c. 172, § 4 (1948); Minn. Stat. Ann. §§ 47.03, 47.23 (1946); Mont. Rev. Code Ann. § 5-508 (1947); N.J. Stat. Ann. § 17:9A-18 (1950); N. C. Gen. Stat. § 53-127 (1950); N.D. Rev. Code § 6-0409 (1943); Ore Comp. Laws Ann. § 40-401 (1940); S.D. Code § 6-0504 (1939).

⁴ The administrative position of the Bureau of the Comptroller of the Currency in respect to the New York statute and the similar California statute is set forth in appellant's Statement as to Jurisdiction. We are advised by the Secretary of the Treasury that the Bureau has adopted the same view as to all state enactments of this nature. And, in so far as the

encourages attempts in the future to require national banks to eliminate the proscribed terms from their titles or advertising. Furthermore, it is equally probable that the decision will be used as the basis for further legislation exercising control over national banks and, by design or otherwise, affording a competitive advantage to state banking institutions.

For these reasons it is respectfully submitted that probable jurisdiction should be noted.

ROBERT L. STERN,
Acting Solicitor General.

NOVEMBER 1953.

state authorities are concerned, we have discovered only one prior instance where an attempt was made to apply such a statute to a national bank. The attempt proved unsuccessful. *Fidelity National Bank and Trust Co. v. Enright*, 264 Fed. 236 (W.D. Mo.).

FILED

FEB 26 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 427.

FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

**BRIEF AMICI CURIAE ON BEHALF OF THE SAVINGS
BANKS ASSOCIATION OF THE STATE OF NEW
YORK IN OPPOSITION TO THE APPEAL.**

✓ FRED N. OLIVER,
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110 East 42nd Street,
New York 17, N. Y.

February 26, 1954.

INDEX.

	PAGE
INTRODUCTION	1
SUMMARY	2
ARGUMENT:	
1. The appellant has failed to demonstrate any substantial interference by the state law with the operation of its business. No material disadvantage to national banks has resulted from inability to use the word "savings" as opposed to "thrift" or other equivalents. Any superior prestige which the word "savings" may have in New York State is due to its long association with mutual savings banks.....	4
2. The policy of the State in reserving the advertising use of the word "savings" to mutual institutions has been long established and is reasonable	10
3. No federal enactment conflicts with the state policy. Despite conflicting views of the Comptroller of the Currency and the General Counsel of the Federal Reserve Board as to whether State laws like Section 258 applied to national banks, Congress has never spoken on this question.....	14
CONCLUSION	18
APPENDIX	1a

TABLE OF CASES.

	PAGE
<i>Anderson National Bank v. Lockett</i> , 321 U. S. 233 (1944)	4
<i>Davis v. Elmira Savings Bank</i> , 161 U. S. 283 (1895) ..	4
<i>First National Bank v. Missouri</i> , 263 U. S. 640 (1924)	17
<i>Kelly v. Washington</i> , 302 U. S. 1 (1939)	17
<i>McClellan v. Chipman</i> , 164 U. S. 357 (1896)	4
<i>People v. Binghamton Trust Co.</i> , 139 N. Y. 185 (1893)	12, 13
<i>People v. Doty</i> , 80 N. Y. 230 (1880)	12, 13

STATUTES AND RULES.

Banking Law of New York,	
Sec. 235	11
Secs. 237, 238	5, 6
Sec. 258	4, 7, 8, 9, 14, 16, 17
Constitution of the State of New York Art. X, Sec. 3	10
Federal Reserve Act, (38 Stat. 251) Sec. 24	14, 15, 16
I. R. C., 26 U. S. C., Secs. 101 (2), 104 (4)	
New York Laws of 1858, chapter 132	10, 11
New York Laws of 1875, chapter 371	1
New York Laws of 1905, chapter 564	1

MISCELLANEOUS.

Paine's New York Banking Laws (Seventh Ed., 1914)	10, 11
Treasury Document 2476 (Instructions of the Comptroller of the Currency relative to the Organization, etc. of National Banks, 1907)	1
Willis & Steiner, Federal Reserve Banking Practice (1926)	

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**BRIEF AMICI CURIAE ON BEHALF OF THE SAVINGS
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Introduction.

The undersigned members of the Bar of this Court file this brief as *amici curiae*, pursuant to Rule 27 (9) (b), on behalf of The Savings Banks Association of the State of New York. There have been filed with the Clerk of this Court the written consents of both parties to the action.

The Savings Banks Association of the State of New York is composed of 130 mutual savings banks in that State. These banks had in the aggregate, as of September 30, 1953, deposits amounting to \$14,100,000,000. They had 7,900,000 depositors, not including school and club savings depositors. The savings banks, being mutual, have no stockholders.

The question presented in this case is whether a New York statute of 1905 implementing a long established state policy of refusing to commercial banks the advertising use of the word "savings" and reserving the word to mutual institutions operated solely for the benefit of those who invest their savings, either impairs the operation of national banks or conflicts with the Federal Reserve Act solely because such act uses the word "savings". The Court of Appeals held the New York statute constitutional.

Summary.

The century old policy of the State of New York, reserving to mutual savings banks and subsequently to other mutual thrift institutions the right to use the word "savings" in advertising, is in our opinion not inconsistent with the Federal Constitution. If in accordance with such a policy the commercial banks of the State, great or small, state or national, are under the necessity of referring to their interest-bearing accounts of individual depositors as "thrift accounts", "special interest accounts", or "compound-interest accounts", rather than "savings accounts", the Constitution of the United States is not thereby offended. That document does not command that a uniform federal terminology must replace state usages of great antiquity, where no federal statute imposes such uniformity and no federal purpose is thwarted by the state policy.

This court has many times held that national banks are subject to the laws of the state in which they operate unless such laws interfere with the purposes of the national bank's creation or impair its efficiency. The record in this case is substantially devoid of any evidence that requiring commercial banks to distinguish their interest-bearing accounts

of individuals from those of non-profit institutions injures the commercial banks. Those who ask this court to approve their defiance of the long-standing law of the State must show that the law in fact operates to cripple them. They have not made such a showing.

The evidence in this case indicates that national banks have prospered equally with mutual savings banks during the time that the challenged statute has been in effect. It also indicates that if the word "savings" has any prestige in New York State not possessed by the terms presently permitted to national banks, it is due to its association with the superior advantages offered by mutual savings banks. In these circumstances, national banks should not be allowed to appropriate a word which for a century and a half has connoted mutuality.

The history of the Federal Reserve Act shows no intention on the part of Congress to challenge or override the long existing state policy, and the mere use of the phrase "savings deposit" in that statute does not conflict with the state law as to advertising.

ARGUMENT.

1. The appellant has failed to demonstrate any substantial interference by the state law with the operation of its business. No material disadvantage to national banks has resulted from inability to use the word "savings" as opposed to "thrift" or other equivalents. Any superior prestige which the word "savings" may have in New York State is due to its long association with mutual savings banks.

Appellant Franklin National Bank deliberately, by its own admission, violated Section 258 of the Banking Law of New York by using the word "savings" in its advertising. It can prevail in this litigation only if it convinces this Court that the law of the State is unconstitutional. Although this is a question of law, its determination, under a series of decisions of this Court, depends on whether the State law "frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created." *Davis v. Elmira Savings Bank*, 161 U. S. 283 (1895); *McClellan v. Chipman*, 164 U. S. 357 (1896); *Anderson National Bank v. Lockett*, 321 U. S. 233 (1944). It is of course the responsibility of the national bank to establish the fact of such frustration or impairment.

In an effort to establish frustration and impairment, the national bank placed on the stand several presidents of national banks who testified that in their opinion, the fact that they were prevented by law from advertising their individual interest-bearing accounts as "savings" deposits was a "stumbling block", a "heavy handicap", and "detrimental".

mental" to them [R. 149, 157]. These self-serving and conclusory declarations of interested parties fall far short of the showing which must be made by one who wishes to overthrow a carefully considered and long-existing state law.

There is no adequate showing as to whether savings banks or savings and loan associations are growing faster or slower than national banks. The evidence would seem to indicate that national banks are thriving. Mr. Roth, President of The Franklin National Bank, testified [R. 492] that "our earnings are one of the best in the State of New York and one of the best in the country." National bank assets and deposits have grown rapidly in recent years.

From December 31, 1945 to December 31, 1949, time deposits* of New York State national banks increased 28.1%. During the same period demand deposits decreased 20.6%, reflecting the post-war contraction in money and credit [Defendant's Exhibit NN, R. 652]. The figure for time deposits includes time deposits of corporations, as to which there are no separate figures in the record. If corporate time deposits declined as did demand deposits, it would necessarily follow that the increase in individual time deposits would have been greater than 28%.

From January 1, 1946 to January 1, 1950, deposits of mutual savings banks in New York State increased 33.9% [Defendant's Exhibit NN]. This figure includes no corporate deposits, since corporate deposits are not permitted to be accepted by New York savings banks, nor does it include demand deposits, since all savings banks' deposits are time deposits. New York Banking Law Sections 237,

* Time deposits are those as to which a bank may require 30 days or more notice before the depositors become entitled to repayment; demand deposits are those as to which no notice is required.

238. It would appear that the deposits of mutual savings banks and the individual time deposits of national banks had increased at about the same rate during the above period.

Individual time deposits of the Franklin National Bank represented by passbook, so-called "savings" deposits, increased 57.5% over the same period [Defendant's Exhibit MM, R. 650].

Accounts of state savings and loan associations increased 53.7% and accounts of federal savings and loan associations increased 100.5% over the same period. The record contains no breakdown of figures as to either "savings" or time deposits of state banks or trust companies.

It is apparent that in so far as the foregoing figures indicate anything, they indicate that New York State's national banks have been growing about as fast as savings banks, despite the alleged influence of Section 258, and that the Franklin National Bank has grown much faster than savings banks.

Direct comparison of the records of the different types of institutions in Nassau County are not feasible. There is only one savings bank in Nassau County [R. 146] where the Franklin National Bank is located, and there are no figures in the record as to savings and loan institutions in Nassau County.

The following table shows comparative growths of passbook accounts of the Franklin National Bank, and of deposits of mutual savings banks in New York State, over a somewhat longer period. The figures for the Franklin National Bank were computed from Defendant's Exhibit MM; the figures for mutual savings banks in New York State from the 1952 annual report of the Superintendent

of Banks, Part Two, New York State Legislative Document (1953) No. 20, Schedule 7C, page 42.*

	<u>Franklin National Bank</u>	<u>New York State Mutual Savings Banks</u>
1941-47.....	424.0%	76.7%
1947-51.....	111.8%	18.7%
1941-51.....	1009.5%	109.9%

It is significant to note that Franklin National grew faster in the years before 1947 when it was observing the law than in the years after 1947 when it was defying the law and using the word "savings" in its advertising. In all three periods it has grown much faster than New York State savings banks.

It is obvious that many factors enter into the composition of these figures and that the periods covered are too short to warrant valid generalizations, but nevertheless the figures show the complete failure of the appellants to show that they have sustained any damage from the operation of Section 258.

Proof is lacking, therefore, that national banks have been handicapped in attracting individual depositors. Moreover, there are no figures to show any causal connection between the inability of commercial banks to use the word "savings" and their rate of growth. That savings banks are materially favored in being granted the exclusive use of the word "savings", or commercial banks materially handicapped in being refused the use of the

* The following are the totals for all New York State mutual savings banks:

Total Deposits	
January 1, 1942.....	\$ 5,554,580,854
January 1, 1948.....	9,814,535,734
January 1, 1951.....	11,664,376,316

word, seems unlikely when the following substantial advantages of mutual savings bank depositors are considered:

1. Mutual savings banks pay all of their earnings to their depositors, except for amounts retained as protective surplus or reserves. Commercial banks pay only such interest to their individual depositors as is necessary to attract deposits; the remainder of their earnings they owe to their stockholders [R. 338].

2. Mutual institutions were exempt from federal income tax for taxable years prior to January 1, 1952. I. R. C., 26 U. S. C., Sec. 101 (2), 101 (4).

3. Mutual savings banks have a record for continued solvency and safety far superior to that of commercial banks. No mutual savings banks in New York State have closed with loss to depositors since 1911, and only three since 1884. Annual Report of the Superintendent of Banks Relative to Savings Banks, 1933, Legislative Document (1934) No. 26, Schedule 10, p. 19.

4. Mutual savings banks in most cases pay a higher return on deposits than do commercial banks [R. 486].

When these substantial advantages of mutual savings bank depositors are considered, it becomes clear that the competitive advantage or disadvantage attached to the use of the word "savings" is minimal. The appellant has not shown that all or any part of the New York public's alleged preference for mutual institutions arises from Section 258. In the absence of such a showing, the appellant has not begun to make the showing necessary to strike down the State law.

The appellant's own evidence negates its claim. Much of its case consisted of an expensive and meticulously designed public opinion survey, in the course of which citi-

zens of Nassau County were asked to distinguish between "savings accounts", "compound interest accounts", "thrift accounts", and so forth; to state which institutions offered these services; and to state in which institutions they preferred to invest their money to earn interest.

The survey, instead of substantiating appellant's case, defeats it. It shows that the majority of Nassau County's citizens (assuming the poll to be an accurate sample) prefer to invest their money in a mutual savings bank, whether they call the deposit a savings account or a compound interest account [R. 638-639]. It shows that although savings and loan associations are permitted by Section 258 to use the word "savings", very few of the persons polled thought that savings and loan associations offered the same service as savings banks [R. 637]. The percentage which thought that savings and loan associations were the best places to go for "savings accounts" was about half the percentage that thought national banks were the place to go [R. 637] indicating very clearly that the right to use the word "savings" is not in itself the thing which attracts or repels customers. The percentage which thought that such accounts were offered at savings and loan associations was about equal to that which thought that they were offered at national banks [R. 633-634]. Similar figures appear with respect to "compound interest" accounts and "special interest" accounts. It is clear from the appellant's own showing that the use of the word "savings" in advertising is of no importance in attracting deposits compared with the substantive and substantial differences between the types of institution.

The most the survey shows is that the public does not think that a savings account is the same thing as a compound interest account, and that it prefers to save in mutual savings banks. On both points the public is correct. Any

superior prestige which the word "savings" may possess arises from the fact that the State, and long usage, have associated it with mutual savings banks; and not the other way round. The prestige of the savings banks is not due to any exclusive right to use the word savings, but to the solid advantages which they offer the thrifty public.

2. The policy of the State in reserving the advertising use of the word "savings" to mutual institutions has been long established and is reasonable.

The state legislation attacked in this case dates back to the Laws of 1858, chapter 132 of which made it unlawful for a certain kind of commercial bank to "put forth a sign as a savings bank". The specific language involved came into the statute with chapter 564 of the Laws of 1905, which forbade the use of the word "savings" by any but a savings bank or a savings and loan association. The policy of the state is thus one of long standing.

The Constitution of the State of New York provides that no savings bank "shall have any capital stock; nor shall the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings." Article X, Sec. 3. This provision or its predecessors have been part of the Constitution of New York since 1846.

The first savings bank in New York was founded in 1819, as a result of a petition addressed to the legislature by the Society for the Prevention of Pauperism (Paine's New York Banking Laws (Seventh Ed., 1914) (p. 59)). Many

other early savings banks were similarly founded as quasi-eleemosynary organizations [R. 285]. The people of the State, both through the Constitutional Conventions and through the legislature, have been careful to preserve the peculiar status and responsibilities of mutual savings banks as trustee organizations, invested with a higher responsibility than the ordinary business organization.

The state has also been careful to supervise the investments of savings banks' depositors' money very carefully. Since the earliest days, such investments have been confined by law to investments of the highest grade. Section 235, New York Banking Law, McKinney's Consolidated Laws of New York Annotated. While the accumulation of funds in savings banks and other institutions, for instance insurance companies, has forced the legislature to broaden the field of investment, including a limited authorization to invest not more than 3% of a bank's assets in high grade common stocks, nevertheless the principle is unchanged that savings banks' investments are regulated and prescribed by the state. This may be contrasted with the practice of national banks as stated by the appellant's president [R. 442], of not segregating the investment of demand deposits and savings deposits, but investing both combined. In other words, the investment of savings banks' deposits is closely regulated, but the deposits of commercial banks may be invested in loans to business enterprise and other loans not specifically prohibited, and no distinction is drawn by commercial banks between demand deposits and time deposits. Perhaps in consequence of these facts, the rate of failures among mutual savings banks during this century has been negligible.

It was only natural, therefore, that the people of the state should desire to keep separate in the public mind the mutual, supervised institution on the one hand and the general commercial bank, operated solely for the benefit of its stockholders, on the other. This they did by the law of 1858 forbidding commercial banks to "put forth a sign as a savings bank". The original statute applied in terms to note-issuing commercial banks; but when note issue by state banks had been taxed out of existence, the statute was promptly amended by Chapter 371 of the Laws of 1875 to apply to all commercial banks (see *People v. Doty*, 80 N. Y. 225 (1880)). In *People v. Binghamton Trust Co.*, 139 N. Y. 185, 34 N. E. 898 (1893), the Court of Appeals construed the statute as inapplicable to mere similarities in business methods. The court said (p. 192),

"The trust Company is incorporated for the purpose of gain to the members of the corporation; while the savings bank is in the nature of a charitable institution, the sole corporate purpose of which is to securely protect moneys deposited up to a certain fixed amount by individuals and, by investing them in such limited and prudent ways as the legislature has prescribed, to secure a safe and moderate return by way of interest upon the moneys held. Whatever tends to the protection of a bank for savings is in the public interest, and it is in the line of that protection that any appearance, or external sign, or representations should be prohibited, which would deceive and cause the public to suppose that a business institution, really organized for the gain of its members, was a savings bank."

Twelve years later, in 1905, the legislature further implemented this historic policy by providing that none but mutual institutions should use the word "savings" in

advertising or in their business. The privilege has been consistently denied to commercial banks, run for the profit of their stockholders and lending the money they receive to the general business community with little restriction. The policy behind such denial is as sound today as it was in 1858.

The prohibition of the word "savings" to commercial banks is clearly in the public interest, and is not designed to preserve any monopoly to mutual institutions. See *People v. Doty*, 80 N. Y. 225 (1880); *People v. Binghamton Trust Co.*, 139 N. Y. 185, 34 N. E. 898 (1893). The prohibition is intended to make it more easily possible for small savers to distinguish between commercial banks and mutual institutions. The small saver is not experienced in distinguishing between banking institutions and for that reason may become confused. To some people a bank is a bank. Mutual savings banks have the primary purpose of promoting and safeguarding depositors' savings at the highest rate of return that can be safely given. It is clearly in the public interest that safeguards against misunderstandings be erected. That is precisely what this legislation did and continues to do. It restricts the use of the word "savings" to mutual institutions primarily engaged in encouraging and safeguarding savings and prohibits its use to others.

As the Attorney General of New York ruled in 1917, in concluding that the use of the word "savings" in Section 19 of the Federal Reserve Act did not nullify the state law:

"The words 'savings banks' have accordingly come to have a special meaning to small savers as denoting this increased protection to their deposits, and they would be deceived by its use by other banks. As Congress did not, we believe, intend to authorize a national bank to do business as a 'savings bank',

so it did not intend to interfere with any safeguards for the small savings depositor which the State may have devised to protect him." 10 St. Dept. Rep. (N. Y.) 489, 491.

3. No federal enactment conflicts with the state policy. Despite conflicting views of the Comptroller of the Currency and the General Counsel of the Federal Reserve Board as to whether state laws like Section 258 applied to national banks, Congress has never spoken on this question.

No federal statute enacted before or since these statutes conflicts with them. Appellants have attempted to imply a conflict with Section 24 of the Federal Reserve Act. Actually, this section makes no reference to advertising powers, but merely states incidentally that a national bank may "continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same" at rates within the specified limits. The statute obviously has nothing to do with advertising.

Originally national banks did not accept passbook deposits of individuals [R. 281]. In 1905 the Comptroller of the Currency issued a circular letter in which he stated that there did not appear to be anything in the National Bank Act which authorized or prohibited the operation of a savings department by a national bank. Willis & Steiner, Federal Reserve Banking Practice (1926) page 657. By 1911 over 50% of national banks reporting to the Comptroller (48% of all national banks) had "savings" deposits.

In 1907 the Comptroller announced:

"The right of a national bank to pay interest on deposits necessarily carries with it the right to advertise that policy, but where, as in some states,

the laws prohibit the use of the word 'savings' and the soliciting or receiving of deposits as a savings bank by banking institutions not authorized by state law to do a savings-bank business, it is probable that the courts will hold the prohibition against the use of the word 'savings' applicable to national banks, but not the prohibition against soliciting and receiving interest-bearing deposits."

This position was adopted by the Comptroller of the Currency in the manual issued periodically by his office, *Instructions and Suggestions of the Comptroller of the Currency Relative to the Organization, Etc. of National Banks*, Treasury Document 2476 (1907) page 41.

The statement was repeated in the 1909, 1911 and 1914 editions of the manual, the last of which appeared subsequent to the passage of the Federal Reserve Act. Beginning with the 1919 edition of the manual, however, the Comptroller changed his position and adopted that of the General Counsel of the Federal Reserve Board. It does not appear that any legislation or decisions subsequent to 1907 contain anything which should have changed the views held by the Comptroller in 1907-1914.

The Federal Reserve Act as passed in 1913 (38 Stat. 251, 273) contained a provision (Sec. 24) authorizing national banks to make loans on farm land up to 25% of capital and surplus or to one-third of its time deposits "and such banks may continue hereafter as heretofore to receive time deposits and pay interest on the same". The General Counsel of the Federal Reserve Board construed this language as granting to national banks by implication the right to advertise "savings" deposits in contravention of state laws (1915 Fed. Res. Bull. 18), but it seems clear that if national banks previously had the power to accept "savings" deposits but not to use the word savings in advertising

where state laws forbade, that situation was not changed by Section 24 as enacted in 1913.

Nor could the situation have been changed by the amendment of February 25, 1927, 44 Stat. 1232, inserting the word "savings" after the word "time", and limiting the rate of interest payable to the maximum paid by state banks. By that time Congress presumably knew that a difference of opinion existed as to whether the state laws such as New York's Section 258 were applicable to national banks. The Attorney General of New York had ruled both before and after the passage of the Federal Reserve Act that the right of national banks to receive "savings" deposits did not make Section 258 inapplicable to their advertising. Op. Atty. Gen. (N. Y.) (1907) 473; Op. Atty. Gen. (N. Y.) (1908) 382; Op. Atty. Gen. (N. Y.) 1917, 10 St. Dept. Rept. 489.

The 1927 amendments to the Federal Reserve and National Bank Acts made a number of adjustments in the delicate field of state and federal relations vis-a-vis national banks, for instance with respect to branch powers of national banks. If Congress had desired to nullify laws such as Section 258, it could have found a more direct way to do so than merely by inserting the word "savings" in a statute limiting the interest rate which national banks could pay on deposits to that paid by state banks. The mere use of the word "savings" in the text of the statute (actually, it is used in one or two other places besides Section 24) made no change in the law as to advertising powers.

The weight of a half century of practical construction, therefore, is in accord with the Comptroller's original conclusion that the practice of national banks in accepting time deposits of individuals, and Congressional sanction thereof, do not carry any implication that Congress has

nullified Section 258. "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Kelly v. Washington*, 302 U. S. 1 (1939). Powers will not be granted to national banks by implication, if such implication will raise an otherwise avoidable conflict with state statutes. *First National Bank v. Missouri*, 263 U. S. 640 (1924).

In this case it is clear that there is no unavoidable conflict between state and nation. Not only can national banks operate by describing their services as "thrift accounts" or the like, but they have so operated for many years, and very prosperously too. If, actually, the advantages which they offer to depositors were equivalent to those of mutual savings institutions in rate of return, safety, or convenience, the craft of modern advertising could in these fifty years have impressed the public with the words "thrift account" as deeply as the public is claimed to have been impressed with the words "savings account". Instead appellants have sought to borrow for their own institutions the implications which in the past century have attached to the word "savings" in New York State. Neither the fact that the word is used by the Federal Reserve Act in the sense appellants desire, nor the fact that it carries their connotation in other states, permits such an appropriation.

The situation in other states is not relevant here. Only two or three states have statutes similar to New York. Moreover, a different situation would obviously be presented if a state were attempting to appropriate a usage popularly connected with national banks, instead of a

national bank attempting to appropriate a usage long associated by the state with mutual institutions.

The Constitution does not prescribe the substitution of a uniform federal terminology for a variety of state usages, merely because the terminology happens to be used in a federal statute. If Congress desires to regulate bank advertising, no doubt it can expressly authorize and direct national banks in such a way as to stamp out state usage; but it has not done so here.

Conclusion.

The mutual institutions of New York and the national banks of New York have prospered side by side for a century, despite the fact that only the former were entitled to use the word "savings" in advertising. An enterprising national bank, feeling that the word carries more prestige than the words "thrift" or "compound interest", now challenges the states' historic policy. It bases its claim to use the word on the fact that the word is used in a Federal statute which was not intended to deal with the question. It has not made any real showing of prejudice other than assertions unsupported by figures. It should not prevail.

Respectfully submitted,

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February 26, 1954.

APPENDIX**Chap. 132, Laws of 1858 (New York)**

SEC. 1. It shall not be lawful for any bank, banking association or individual banker, authorized to issue circulating notes, by the law of this state, established in any city or village where a chartered savings bank is located and transacting business, to advertise or put forth a sign as a savings bank, and any bank, banking association, or individual banker, which shall offend against these provisions shall forfeit and pay for every such offence the sum of one hundred dollars for every day such offence shall be continued, to be sued for and recovered in the name of the people of the state, by the district attorneys of the several counties in any court having cognizance thereof, for the use of the poor, chargeable to said county in which such offense shall be committed.

Chap. 371, Laws of 1875 (New York)

SEC. 49. It shall not be lawful for any bank, banking association or individual banker, to advertise or put forth a sign as a savings bank, or in any way to solicit or receive deposits as a savings bank; and any bank, banking association or individual banker, which shall offend against these provisions, shall forfeit and pay for every such offense. * * *

Chap. 564, Laws of 1905 (New York)

SEC. 1. Section one hundred and thirty one * * * as amended * * * is hereby amended to read as follows:

SEC. 131. Advertisements of unauthorized savings banks prohibited. No bank, banking association, individual banker, firm, association, corporation, person or persons shall make use of the word "savings" in their banking business, or advertise or put forth any advertising litera-

ture, or sign as a savings bank, or in any way solicit or receive deposits as a savings bank, other than a savings bank or a building and loan association organized under the laws of the state of New York . . .

Sec. 24, Federal Reserve Act of 1913, 38 Stat. 273
Loans on Farm Lands

Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land, situated within its Federal reserve district, but no such loan shall be made for a longer time than five years, nor for an amount exceeding fifty per centum of the actual value of the property offered as security. Any such bank may make such loans in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same. * * *

Sec. 16, P. L. 639, 69th Cong., 44 Stat. 1232 (1927)

That section 24 of the Federal Reserve Act be amended as follows:

SEC. 24. Any national banking association may make loans secured by first liens upon improved real estate, including improved farm land, situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines. A loan secured by real estate within the meaning of this section shall be in the form of an obligation or obligations secured by mortgage, trust deed, or other such instrument upon real estate when the entire amount of such obligation or obligations is made or sold to such association. The amount of any such loan shall not exceed 50 per centum of the actual value of the real

estate offered for security, but no such loan upon such security shall be made up for a longer term than five years. Any such bank may make such loans in an aggregate sum including in such aggregate any such loans on which it is liable as indorser or guarantor or otherwise equal to 25 per centum of the amount of the capital stock of such association actually paid in and unimpaired and 25 per centum of its unimpaired surplus fund, or to one-half of its savings deposits, at the election of the association, subject to the general limitation contained in Section 5200 of the Revised Statutes of the United States. Such banks may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such banks may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State wherein such national banking association is located.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement.....	2
Summary of argument.....	8
Argument:	
The New York statute unduly burdens the power of national banks to receive and advertise for savings deposits, and therefore conflicts with controlling Federal law.....	12
A. The state statute impairs the federally created power to receive savings deposits and advertise effectively for such business.....	17
B. The New York statute as applied in this case cannot be sustained by the State's asserted purpose of preventing deception.....	34
Conclusion.....	38
Appendix.....	39

CITATIONS

Cases:

<i>Adams v. United States</i> , 319 U. S. 312.....	34
<i>Akins v. Texas</i> , 325 U. S. 398.....	25
<i>Anderson National Bank v. Lockett</i> , 321 U. S. 233.....	12, 13, 14, 22, 26
<i>Burnes National Bank v. Duncan</i> , 265 U. S. 17.....	30
<i>Chambers v. Florida</i> , 309 U. S. 227.....	25
<i>Clement National Bank v. Vermont</i> , 231 U. S. 120.....	14, 18, 19, 22, 30
<i>Craig v. Harney</i> , 331 U. S. 367.....	25
<i>Davis v. Elmira Savings Bank</i> , 161 U. S. 275.....	10, 13, 17
<i>Davis v. Farmers Co-operative Co.</i> , 262 U. S. 312.....	19
<i>Easton v. Iowa</i> , 188 U. S. 220.....	10, 13
<i>Edward's Lessee v. Darby</i> , 12 Wheat. 207.....	34
<i>Fay v. New York</i> , 332 U. S. 261.....	25
<i>Federal Trade Commission v. Raladam Corp.</i> , 316 U. S. 149.....	24
<i>Fidelity National Bank and Trust Co. v. Enright</i> , 264 Fed. 236.....	33
<i>First National Bank v. Anderson</i> , 269 U. S. 341.....	30
<i>First National Bank v. California</i> , 262 U. S. 366.....	10, 12, 22, 26
<i>First National Bank v. Fellows</i> , 244 U. S. 416.....	15, 30
<i>First National Bank v. Hartford</i> , 273 U. S. 548.....	14, 23, 25, 30

II

Cases—Continued

	Page
<i>First National Bank v. Missouri</i> , 263 U. S. 640.....	13, 30
<i>Fiske v. Kansas</i> , 274 U. S. 380.....	25
<i>Great Northern Ry. Co. v. Washington</i> , 300 U. S. 154 ^o	25
<i>Hooven & Allison Co. v. Evatt</i> , 324 U. S. 652.....	25
<i>Jennings v. United States Fidelity & Guaranty Co.</i> , 294 U. S. 216.....	13
<i>Johnson v. Maryland</i> , 254 U. S. 51.....	37
<i>Kansas City Southern R. Co. v. Alberts Comm'n Co.</i> , 223 U. S. 573.....	25
<i>Lewis v. Fidelity Co.</i> , 292 U. S. 559.....	13, 14, 17
<i>Mayo v. United States</i> , 319 U. S. 441.....	37
<i>McClellan v. Chipman</i> , 164 U. S. 347.....	14
<i>McCulloch v. Maryland</i> , 4 Wheat. 316.....	13
<i>National Bank v. Commonwealth</i> , 9 Wall. 353.....	14
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U. S. 294.....	11, 34
<i>Ohio v. Thomas</i> , 173 U. S. 276.....	37
<i>Oyama v. California</i> , 332 U. S. 633.....	25
<i>Patton v. Mississippi</i> , 332 U. S. 463.....	25
<i>Pennekamp v. Florida</i> , 328 U. S. 331.....	25
<i>Pierre v. Louisiana</i> , 306 U. S. 354.....	25
<i>Pollock v. Williams</i> , 322 U. S. 4.....	25
<i>Roth v. Delano</i> , 338 U. S. 226.....	14
<i>Taylor v. Mississippi</i> , 319 U. S. 583.....	25
<i>Truax v. Corrigan</i> , 257 U. S. 312.....	25
<i>United States v. American Trucking Ass'ns, Inc.</i> , 310 U. S. 534.....	11, 34
<i>Waite v. Dowley</i> , 94 U. S. 527.....	13

Constitution and Statutes:

Constitution of the United States, Art. VI, cl. 2.....	8, 12
Act of May 24, 1926, Sec. 3, 44 Stat. 628.....	19
Act of August 23, 1935, c. 614, 49 Stat. 706.....	28
Federal Reserve Act, 38 Stat. 251, as amended:	
Section 2 (12 U. S. C. 282).....	12
Section 19 (12 U. S. C. 461).....	23
Section 24 (12 U. S. C. 371).....	9, 18, 28, 29, 30, 39
National Bank Act of 1864 (R. S. 5133, 12 U. S. C. 21)....	3
R. S. 5133, 12 U. S. C. 21.....	3
R. S. 5134, 12 U. S. C. 22.....	34
R. S. 5136, as amended, 12 U. S. C. 24.....	18, 40
R. S. 5153, as amended, 12 U. S. C. 90.....	12
R. S. 5219, as amended, 12 U. S. C. 548.....	30
40 Stat. 968, 12 U. S. C. 248 (k).....	30
44 Stat. 1228, as amended, 12 U. S. C. 36.....	30
18 U. S. C. 709.....	19, 35, 41
Mass. Ann. Laws 1948, c. 167, secs. 12, 13.....	21
New York Banking Law, Section 258 (1).....	2, 9, 19, 42

III

Miscellaneous:	Page
<i>Annual Report of the Board of Governors of the Federal Reserve System, 1952</i> , pp. 13, 32.....	12, 27
<i>Annual Report of the Comptroller of the Currency, 1912</i> , pp. 11, 12.....	18
<i>Annual Report of the Comptroller of the Currency, 1952</i> , pp. 1, 12.....	12, 26
12 C. F. R. 217.1 (e).....	23
31 C. F. R. 317.2.....	12
<i>Federal Reserve Bulletin</i> , Vol. I (1915), p. 18.....	32, 35
H. Rep. No. 83, 69th Cong., 1st Sess., p. 6.....	28
Letter of July 15, 1927, addressed to Mr. G. Patterson Crandall, Vice President, the National Bank of Westfield, Westfield, New York, from Deputy Comptroller E. W. Stearns.....	33
Letter of April 16, 1932, addressed to Deputy Superintendent August Ihlefeldt, Jr., of the New York State Banking Department, from Deputy Comptroller E. H. Gough.....	33
Letter of April 14, 1938, addressed to Mr. Arthur J. Geoghegan, Vice President, the Central National Bank of New Rochelle, New Rochelle, New York, from Deputy Comptroller Gough.....	33
Letter of December 14, 1938, signed by Deputy Comptroller C. G. Upham and addressed to the Vice President and Cashier of the First National Bank of Glens Falls, Glens Falls, New York.....	33
Letter of July 10, 1939, to the attorney General for the State of New York, from the Comptroller of the Currency.....	33
S. Rep. No. 473, 69th Cong., 1st Sess., p. 11.....	28

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN
SQUARE, APPELLANT

v.

THE PEOPLE OF THE STATE OF NEW YORK

*ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of New York, Special Term (R. 654-672), is reported at 200 Misc. 557, 105 N. Y. S. 2d 81. The opinion of the Supreme Court of New York, Appellate Division (R. 679-683), is reported at 281 App. Div. 757, 118 N. Y. S. 2d 210. The opinion of the Court of Appeals (R. 684-692) is reported at 305 N. Y. 453, 113 N. E. 2d 796.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1953 (R. 692-693). The

judgment of the Supreme Court, Special Term, on the remittitur of the Court of Appeals was entered on July 29, 1953 (R. 693-695). The petition for appeal (R. 697) was filed and allowed on September 29, 1953 (R. 697-698). The appeal was docketed in this Court on November 6, 1953 (R. 700). Probable jurisdiction was noted on December 7, 1953 (R. 701). The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

QUESTION PRESENTED

Whether a state statute prohibiting a national bank from using the words "saving" or "savings" in the exercise of its federal authority "to receive * * * savings deposits" unconstitutionally impairs the bank's power granted by the federal banking laws.

STATUTES INVOLVED

The pertinent portions of the New York Banking Law, the National Bank Act, as amended, and the Federal Reserve Act, as amended, are set forth in the Appendix, *infra*, pp. 39-43.

STATEMENT

The State of New York brought this action under Section 258 (1) of the New York Banking Law (Appendix, *infra*, pp. 42-43) to enjoin the appellant national bank from (1) using the word "saving" or "savings" in its banking business and (2) holding itself out to the public as a "savings bank" (R. 3-5). The New York statute

prohibits banks, including national banks, other than savings banks (*i. e.*, banks incorporated on a mutual basis as savings banks under New York law, authorized by the State Superintendent of Banking to do business as savings banks, and subject to state statutory restrictions on investment) and savings and loan associations, from using the word "saving" or "savings" in their business and from soliciting deposits as savings banks.

The appellant is a national bank, organized and existing under the National Bank Act of 1864 (R. S. 5133, 12 U. S. C. 21) (R. 3). The appellant, like other national banks in New York and elsewhere, maintains a savings department as part of its regular banking business (R. 6-7). In the operation of its savings department, appellant has occasion to use the terms "saving" or "savings" in a number of ways:—It maintains signs in its bank building, and on tellers' windows, indicating the location of the savings department (R. 8-9, 588); it places on its counters deposit and withdrawal slips using the proscribed words (R. 9-10, 534A, 579); it distributes to the public coin cards, circulars, and handbills soliciting savings deposits (R. 10-11); it distributes copies of its annual report, discussing, among other matters, the operations of the savings department (R. 11, 556); and it advertises in newspapers and elsewhere for savings deposits (R. 11-12, 529-533).

being solicited. To prove this, it introduced expert opinion testimony bearing on the handicap resulting from the restriction (R. 142, 156-159, 169-170); statistics showing the decline in savings accounts, relative to demand deposits, in national banks attempting to operate under the restraint (R. 650); and the results of a public opinion poll, the "Hofstra" poll, which showed in part that while only 15% of the public did not know the meaning of the term "savings account," 53.3%, 62.7% and 52.7% respectively did not know the meaning of the terms "compound interest account," "special interest account," and "thrift account" (R. 172-417, 626-639).

The trial court denied the injunction and dismissed the complaint (R. 15). It found on the evidence that there was no violation of the state statute's provision against soliciting deposits or holding out as a savings bank (R. 656, 666-667). The state prohibition against the use of "saving" and "savings," which the appellant admitted having violated, the court held unconstitutional as conflicting with the provisions of the Federal Reserve Act empowering national banks to receive savings deposits (R. 667-672). It held that the power to do business in savings deposits necessarily included the power to advertise, and that the statute, by impairing the latter power, impaired the ability of the appellant to carry out effectively the purpose of Congress

in granting the power "to receive * * * savings deposits."

On appeal, the Appellate Division reversed and granted the injunction sought by the State (R. 676-678).² On the basis of its views (1) that the words "saving" or "savings" were "so associated with the idea of 'savings bank' that, if used by another kind of bank, some people were apt to be misled into thinking it to be a mutual savings bank" (R. 680) and (2) that the statute applied to innocent as well as intentional deception, the court set aside the finding that there was no intention to deceive the public into believing that the appellant was a savings bank and granted an injunction against appellant's soliciting deposits as a savings bank (R. 679-681). It also held that there was no conflict between the state and federal statutes, on the theory that the federal laws do not expressly confer the power to use the particular words proscribed by the State. Accordingly, the court granted the injunction against appellant's "using the words 'saving' or 'savings' in relation to its banking or financial business in its dealings with the public, and from in any way soliciting or receiving deposits as a savings bank" (R. 679).

On a further appeal, the Court of Appeals restored the finding of the trial judge that there

² Of the five judges in the Appellate Division, one dissented and one did not sit.

was no evidence that appellant had solicited deposits as a "savings bank," and modified the Appellate Division's order to eliminate the injunction on that score (R. 685). On the question of the use of the prohibited words, the court upheld the injunction. It held, two judges dissenting, that the federal statutes, while authorizing the receipt of deposits of the kind known as "savings deposits," did not empower national banks to use the particular words "saving" and "savings," so that there was no conflict (R. 687-688). It reasoned that the New York statute had the valid purpose of preventing deception and that it had not in fact seriously impaired the ability of national banks in the State to carry out the function of receiving savings deposits (R. 687-691).

SUMMARY OF ARGUMENT

It is undisputed that the states are precluded by the Supremacy Clause of the Federal Constitution from impairing or impeding the federally authorized functions of national banks, which are instrumentalities of the United States serving important national purposes. While this principle is acknowledged by the court below, it is violated by the court's holding that New York may forbid national banks to use the words "saving" or "savings." For the State's prohibition is irreconcilable with the express federal authority of national banks "to receive* * * savings

deposits" and their further authority to exercise all incidental powers necessary to this function.

A. Long before Congress authorized such activities in so many words, national banks received "savings deposits," maintained "savings departments," and used the precisely appropriate word "savings" in describing these activities to the public. Congress, erasing any possible doubt as to the propriety of this function, then amended the federal statutes to describe the power of national banks as including the power "to receive * * * *savings deposits*" (emphasis added). The State's attempt to deprive national banks of the apt and ordinary words "saving" and "savings" works a direct impairment of the authority Congress expressly conferred. That result, without more, would be enough to invalidate the New York statute as applied here.

Moreover, the record of this case, illustrating a fact the Court might well notice judicially, proves that substitute terms are sharply inferior to the word "savings" in describing savings deposits, savings accounts, and savings departments. The evidence shows that national banks are, accordingly, hampered in exercising their power "to receive * * * savings deposits" by New York's requirement that they resort to words other than the common one Congress itself employed to describe this activity. Where, as here, a state undertakes to impair the efficiency of national

banks in soliciting and accepting deposits, the state's action is unconstitutional. *First National Bank v. California*, 262 U. S. 366; *Easton v. Iowa*, 188 U. S. 220; *Davis v. Elmira Savings Bank*, 161 U. S. 275.

This conclusion is reenforced when account is taken of the importance of savings deposits to national banks and of the fact that Congress has sought for national banks, in this as in other aspects of their authorized business, a footing of substantial competitive equality with other banks. Savings deposits constitute a considerable proportion of the resources national banks must have in order to serve their vital function as lending institutions. When Congress made clear the power of national banks to receive such deposits, at the same time liberalizing their inseparably related lending powers, it plainly evidenced its objective of eliminating competitive handicaps on the national banks. Other portions of the federal banking laws serve the same general purpose. Whatever its supposed reason in state policy, New York's appropriation for specified state banks of the everyday words "saving" and "savings" imposes upon national banks a competitive disability which cannot be squared with the contrary purpose of Congress.

The Federal Reserve Board and the Comptroller of the Currency, the federal agencies re-

sponsible for supervising and regulating national banks, have for some 40 years held the New York statute and similar state restrictions inapplicable to national banks. Even if the case were more doubtful, this uniform administrative interpretation would weigh heavily against the decision below. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549.

B. The State justifies its denial to national banks of the words "saving" and "savings" on the ground that these words are "misleading." It argues that a national bank using these words in connection with its receipt of "savings deposits" might lead some people to confuse it with a state-controlled "mutual savings bank."

It may be questioned whether a national bank, properly designated as such, would be likely to create such confusion in fact. But whether or not the State's legislative judgment might be deemed reasonable, standing alone, it is not open to the State to outlaw as "deceptive verbiage" the precise, and precisely appropriate, words Congress used. If, as we urge, the use of these very words by Congress in describing the national banks' function gives the banks the incidental power to use the same words in the same way, the State's theory of deceptiveness must yield.

ARGUMENT

The New York statute unduly burdens the power of national banks to receive and advertise for savings deposits, and therefore conflicts with controlling Federal law

There is no dispute in this case over the settled proposition that national banks "are instrumentalities of the Federal Government" (*First National Bank v. California*, 262 U. S. 366, 368; *Anderson National Bank v. Lockett*, 321 U. S. 233, 251), created by federal law and serving vital federal purposes.³ It is equally unquestioned that the Supremacy Clause of the Constitution⁴ precludes interference by the states,

³ Among the well-known public functions of national banks are those of acting as depositaries for federal funds and as government fiscal agents (R. S. 5153, as amended, 12 U. S. C. 90), serving as agents for the sale of government savings bonds (see 31 C. F. R. 317.2), and providing a source of credit for the Government. On December 31, 1952, United States Government deposits in national banks totaled more than 3.25 billion dollars, and national banks were creditors of the Government to the extent of 35.9 billion dollars. *Annual Report of the Comptroller of the Currency*, 1952, pp. 1, 12. In addition, national banks form the backbone of the Federal Reserve System, through which the money supply of the economy is controlled and through which Government monetary policy is effectuated. National banks are required by law to belong to the Federal Reserve System (Federal Reserve Act, § 2, 38 Stat. 251, as amended, 49 Stat. 704, 12 U. S. C. 282); of the 6798 member banks of the Federal Reserve System, 4909 are national banks. See *Annual Report of the Board of Governors of the Federal Reserve System*, 1952, p. 32.

⁴ U. S. Const., Art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the

“whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.” *Easton v. Iowa*, 188 U. S. 220, 229, 238; cf. *McCulloch v. Maryland*, 4 Wheat. 316. As the Court said in *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283:

National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

See also *Waite v. Dowley*, 94 U. S. 527, 533; *First National Bank v. Missouri*, 263 U. S. 640, 656; *Lewis v. Fidelity Co.*, 292 U. S. 559, 566; *Jennings v. U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 219; *Anderson Nat. Bank v. Lockett*,

supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

321 U. S. 233, 248; *Roth v. Delano*, 338 U. S. 226, 230.

It is equally true, of course, that Congress has neither clothed national banks with the immunity of the United States nor exempted them generally from the operation of state laws. National banks may be subject in their daily course of business to state laws relating to such matters as contracts, their acquisition of property, their right to collect debts, their right to be sued for debts, and the rights of succession to property. *Anderson National Bank v. Lockett*, 321 U. S. 233; *McClellan v. Chipman*, 164 U. S. 347, 356; *National Bank v. Commonwealth*, 9 Wall. 353, 362.⁵ But the limiting principle remains that a national bank is protected against any state law which "interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law." *Lewis v. Fidelity Co.*, 292 U. S. 559, 566. In one of its more recent reaffirmances, the test was stated to be whether state "laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." *Anderson National Bank v. Lockett*, 321 U. S. 233, 248.

Among the federally authorized functions which the states are forbidden to burden unduly are not

⁵ As to the power of states to impose nondiscriminatory taxes on the deposits or capital of national banks, compare *Clement National Bank v. Vermont*, 231 U. S. 120, with *First National Bank v. Hartford*, 273 U. S. 548.

only those which have a directly public aspect, but also those which indirectly affect the public through their effects on the general economic strength of national banks and their ability to compete with other banks. As this Court stated in *First National Bank v. Fellows*, 244 U. S. 416, 420:

In *Osborn v. Bank*, 9 Wheat. 738, where substantially the subject was presented in the same form in which it had been passed upon in *McCulloch v. Maryland*, yielding to the request of counsel, the whole subject was reexamined and the previous doctrines restated and upheld. Considering more fully, however, the question of the possession by the corporation of private powers associated with its public authority and meeting the contention that the two were separable and the one, the public power, should be treated as within and the other, the private, as without the implied power of Congress, it was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular character of business might not be when iso-

latedly considered within the implied power of Congress, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful. It was said: "Congress was of opinion, that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature."

While the foregoing principles have not been questioned by the court below, they are clearly violated, we believe, by the court's decision. In forbidding the appellant national bank to use, for advertising or any other purpose, the ordinary and apt words Congress and everyone else uses to describe the bank's function of accepting "savings" deposits, the New York statute collides squarely with the federal law creating the bank and its powers. The result, conflicting with the national bank's express power "to receive * * * savings deposits" and the inevitably implied power to describe and advertise this function in the appropriate terms which create it, runs counter to the congressional objective to place national banks on an equal competitive footing with other banks engaged in similar activities. The very least that can be said against the

New York statute, as it has been applied in this case, is that it "impairs the efficiency" of the national bank (*Davis v. Elmira Savings Bank, supra*, at 283) and "interferes with the purposes of its creation" (*Lewis v. Fidelity Co., supra*, at 566). Because this is so, the State's effort to justify its regulation as a protection against deceit must fail. This must be the conclusion, wholly apart from the evident peculiarity of finding deceit in the use by a national bank of the ordinary English words which Congress, the courts, and the whole community employ precisely as the bank employs them. For even if the State's expropriation of the words were more plausible than it is, its judgment that the words "saving" and "savings" are "misleading" descriptions of saving and savings cannot destroy the bank's authority (stemming plainly from the implicit congressional judgment that the words mean what Congress said with them) to describe its functions and services as Congress defined them.

A. The state statute impairs the federally created power to receive savings deposits and advertise effectively for such business

1. Included in the broad area of necessary agreement in this case is the fact that national banks have statutory authority "to receive * * * savings deposits." The practice of maintaining savings departments and receiving such deposits became widespread among the national banks

soon after the creation of the national banking system, before it was sanctioned in so many words by the federal statutes. See, *e. g.*, *Clement National Bank v. Vermont*, 231 U. S. 120; *Annual Report of the Comptroller of the Currency*, 1912, pp. 11, 12. Then, Congress, in the Federal Reserve Act, gave express recognition to the practice and express confirmation of the power of national banks to receive such deposits. As amended in 1927, Section 24 of that Act provided (Act of February 25, 1927, c. 191, 44 Stat. 1232, 12 U. S. C. 371):

Such national banks may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such banks may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State wherein such national banking association is located.*

In addition to their specific authority "to receive * * * savings deposits," national banks have been endowed by Congress with "all such incidental powers as shall be necessary to carry on the business of banking." R. S. 5136, as

* As originally enacted, Section 24 of the Federal Reserve Act (38 Stat. 273), lacking the subsequently added explicit reference to "savings deposits," provided:

"* * * and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same."

amended, 12 U. S. C. 24. Among the most obvious of necessary "incidental powers" is the power of advertising the functions and services the bank stands ready to perform. Expert opinion in the record of this case testifies to this plain business fact (R. 135-139, 166-167). Decisions of this Court illustrate it.' And both the appellee and the court below acknowledge the power of national banks to advertise.*

Conceding both the authority of national banks to receive savings deposits and their vital accompanying power to advertise for such business, the court below nevertheless enforced the literal mandate of the New York Banking Law and enjoined the appellant "from advertising or otherwise using the word 'saving' or 'savings' in relation to its banking or financial business in its dealings

* The opinion in *Clement National Bank v. Vermont*, 231 U. S. 120, 139, sets forth verbatim extracts from the advertisements of a national bank soliciting savings deposits. See, also, *Davis v. Farmers Co-operative Co.*, 262 U. S. 312, 315, where the Court noted that solicitation of trade "is a recognized part of the business of interstate transportation."

* While the point scarcely requires extended demonstration, it may be noted that the federal banking laws recognize the role of advertising in banking by imposing prohibitions against deceptive advertising. Thus, the Federal Reserve Act forbids any bank not a member of the Federal Reserve System to "publish or display any sign, symbol, or advertisement reasonably calculated to convey the impression that it is a member of that system." 44 Stat. 628; 18 U. S. C. 709. It also forbids any bank to make use of the words "Federal" or "United States" "or any other words implying Government ownership * * * in advertising or offering for sale any" security not issued by the Government. *Ibid.*

with the public" (R. 678). This sweeping prohibition affects not only advertisements, but many other aspects of appellant's "dealings with the public" in which it uses the word "savings" to identify its authorized function of receiving "savings deposits." For example, as the opinion below points out (R. 685), the appellant has a "savings department" and a special department for "Children's Savings"; it has identified some of its tellers' windows with signs containing the word "savings"; "and, in general, it routinely and extensively uses the words 'saving' and 'savings' to bring to itself 'savings deposits' in competition with savings banks and savings and loan associations in Nassau County and elsewhere." In every such instance, under the decision below, the bank must eschew the word "savings", and describe the deposits Congress called "savings deposits" with "such synonymous expressions as 'special interest account', 'thrift account' and 'compound interest account'" (R. 689).

The restriction is, in our view, a sharp and obvious impairment of the national bank's authority to receive "savings deposits." As we point out below, the words Congress used are the most appropriate and by far the best understood means of describing the function. When it authorized the function, and conferred the incidental powers necessary to its effective performance, Congress

can scarcely be supposed to have intended that the states should be free to strip national banks of the power to use the words which precisely describe their business. It is true, as the court below observed (R. 688), that "there is no Federal statute relating to the use of those words, as such." It is also true that Congress has never deemed it necessary to write a statute authorizing national banks to use the word "bank" or "banking" or any of the other basic English terms they are likely to need in communicating with the public. But, as this Court's decisions make clear, the federal authority of national banks has never been construed with the kind of hostile literalism which insists on detailed chapter-and-verse authority for every action taken and term used by the bank.⁹ Even if there were no proof in this record, or no reason to infer, that the appellant was actually hobbled in its banking business by the New York statute, the patent inconsistency between the federal authorization and the state law would be enough to overturn the latter.

⁹ It is noteworthy in this connection that the law of Massachusetts permits only certain specified corporations, not including national banks, to use the words "bank" or "banking" in their names. Mass. Ann. Laws 1948, c. 167, secs. 12, 13. Nevertheless, all national banks in Massachusetts use the word "bank" in their titles and the State's officials do not appear to have deemed this usage unlawful. If the decision below is upheld, however, the continued freedom of national banks in this respect would at least be open to substantial doubt.

2. But, as the record in this case shows, there is good reason to believe that the state statute does impose a substantial burden. This Court said in *First National Bank v. California*, 262 U. S. 366, 369: "Plainly, no State may prohibit national banks from accepting deposits *or directly impair their efficiency in that regard*" [emphasis added]. A state statute which serves to "deter" depositors "from placing or keeping their funds in national banks" (*Anderson National Bank v. Lockett*, 321 U. S. 233, 250), is, accordingly, invalid. New York's statute, seriously impairing the function of communicating effectively with potential depositors who wish to make savings deposits, cannot be reconciled with these controlling principles.

When Congress empowered national banks "to receive * * * *savings* deposits," it used the common words of everyday American speech to describe the authority it conferred. Laymen and technicians alike use the words "saving" and "savings" in referring to the kind of deposits and accounts in question. For example, at a time before the applicable federal statutes spoke in terms of "savings deposits" but when the broad functions of national banks were deemed to include the handling of such deposits (see *supra*, pp. 17-18), this Court, in *Clement National Bank v. Vermont*, 231 U. S. 120, referred repeatedly and quite naturally to the bank's "savings department" and quoted the bank's advertisements seek-

ing "savings accounts" (p. 139). See, similarly, the casual and matter-of-fact reference to the "savings department" of the national bank in *First National Bank v. Hartford*, 273 U. S. 548, 553. And the Board of Governors of the Federal Reserve System, exercising its authority (12 U. S. C. 461) to make definitions of "savings deposits" and other terms governing members of the Federal Reserve System (most of which—see *supra*, p. 12, n. 3—are national banks), has done the only thing it could have been expected to do: it has defined "savings deposits" to describe the kind of deposits the appellant bank can and does receive. 12 C. F. R. 217.1 (e).

More significant than the matter of technical definition is the fact that the ordinary person thinks of making "savings deposits" in "savings accounts." If this fact requires demonstration, the record of the present case supplies it. The evidence shows decisively, without contradiction, that the words "saving" and "savings" are measurably more efficacious in informing the public of the nature of the service offered by the bank than are the substitute terms the State is willing to sanction. Thus, referring to the results of the Hofstra poll bearing on this issue (*supra*, p. 6), the trial court said (R. 662):

Without regard to actual percentages, the answers develop the point which this court has appreciated all along by reason of common knowledge, viz: that the public

understands the meaning of the term "savings account", for what it really is, far better than it understands the meaning of any of the substitute terms. I am also satisfied, based upon all the proof herein and judicial notice, that the word "savings", when used with the word "account" in relation to a bank provokes a much stronger appeal to the eye and understanding of the public than do the substitutes, when placed before persons disposed to open an interest bearing bank account.

It is clear, in a word, that national banks are hampered in receiving "savings deposits" when they are forbidden to use the words Congress has used and must resort to "synonyms" which are not effectively synonymous to describe this function. It is no answer to observe, as did the court below (R. 688), that it is "*possible * * ** to carry on the business of receiving this type of deposit" calling it by some other name (emphasis added). Nor is it significant that national banks may even have prospered in New York despite the restraint. Cf. *Federal Trade Commission v. Raladam Corp.*, 316 U. S. 149, 152. It is noteworthy in this connection that the record contains undisputed evidence, accepted in the trial judge's findings, indicating not only that savings deposits in national banks operating under the statutory restraints have declined relative to demand deposits, but also that, owing to the restriction imposed by the State, national banks have not prospered to the

same extent as savings banks. See R. 106, 145, 147, 149. But all that matters, in any event, is that the New York prohibition impedes the vital function of communicating to the public, in the understandable language used both by the public and by Congress, the nature of appellant's business. It is immaterial that the damaging effects of the impediment may not lend themselves to precise measurement. It is enough that there is damage, proved without contradiction on the record, and that the restriction which causes the damage cuts into a function protected by paramount federal authority against impairment by any state.¹⁰

3. The savings deposit activities of national banks, thus hampered by the New York statute, cannot be dismissed as unimportant. On the

¹⁰ The court below, while it undertakes to minimize the impact of the state limitation, does not conclude that it is wholly harmless. However, even if the court had asserted such a conclusion, it would be refuted by the record. And it is clear, of course, that this Court is free to examine for itself the evidence claimed to show an undue burden upon the federally created function of the national bank. *First National Bank v. Hartford*, 273 U. S. 548, 553; cf. *Kansas City Southern R. Co. v. Alberts Comm'n Co.*, 223 U. S. 573, 591; *Truax v. Corrigan*, 257 U. S. 312, 324; *Fiske v. Kansas*, 274 U. S. 380, 385; *Great Northern Ry. Co. v. Washington*, 300 U. S. 154, 165, 167; *Pierre v. Louisiana*, 306 U. S. 354, 358; *Chambers v. Florida*, 309 U. S. 227, 228; *Taylor v. Mississippi*, 319 U. S. 583, 585-586; *Pollock v. Williams*, 322 U. S. 4, 13; *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 659; *Akins v. Texas*, 325 U. S. 398, 401; *Pennekamp v. Florida*, 328 U. S. 331, 335; *Craig v. Harney*, 331 U. S. 367, 373; *Fay v. New York*, 332 U. S. 261, 272; *Patton v. Mississippi*, 332 U. S. 463, 466; *Oyama v. California*, 332 U. S. 633, 636.

contrary, it is of vital concern to the discharge of their public functions (see fn. 3, *supra*, p. 12) that national banks should be free to receive savings deposits. It is of corollary importance that in this, as in other aspects of their business, national banks should be able to compete on as nearly an equal footing with state banks and other financial institutions as may be consistent with federal banking policy. These considerations, obviously underlying the relevant federal legislation, are thwarted by New York's statute.

"The success of almost all commercial banks depends upon their ability to obtain loans from depositors." *First National Bank v. California*, 262 U. S. 366, 370; *Anderson National Bank v. Lockett*, 321 U. S. 233, 251. The ability of commercial banks to obtain deposits from the public is the measure of their ability to invest the proceeds, and such investment is the life blood of banks. Savings deposits constitute a considerable part of this source of the investment funds of the national banking system as a whole. As of December 31, 1952, the total deposits of national banks amounted to 99.2 billion dollars, of which more than 23 billion, or 23.3 percent, comprised savings or other forms of time deposits. *Annual Report of the Comptroller of the Currency*, 1952, p. 12. "Total loans and investments of commercial banks * * * increased 9 billion dollars in 1952 to a total of 141 billion. A considerable part of the expansion represented investment of

savings and time deposits." *Annual Report of the Board of Governors of the Federal Reserve System*, 1952, p. 13.

Congress has given explicit recognition to the fact that savings deposits are essential to the successful functioning of national banks; and at the same time it has evidenced its desire that in the inseparable functions of receiving and investing such deposits the national banks should be free of handicaps on their ability to compete with other banks. Pointing out that national banks are "commercial" banks, as distinguished from "mutual" savings banks, the court below concluded (R. 688) that the State could predicate upon this distinction a discrimination which gives an advantage to the latter in the business of receiving savings deposits. The apparent premise is that the only area of unfettered competition should be that involving national banks and New York commercial banks, which are subject to the same prohibition against use of the word "savings". But in creating the national banks' authority to receive savings deposits, and in pressing toward its objective of competitive equality, Congress left no room for any such basis for discrimination against national banks. Congress provided for them freedom to compete equally with all other institutions handling savings accounts.

The provision in which Congress, in 1927, expressly conferred on national banks the power to

receive savings deposits (44 Stat. 1232, 12 U. S. C. 371) (*supra*, p. 18) was part of an amended re-statement of the law governing real estate loans by national banks. The amended section extended the maximum period of loans by national banks on the security of real estate mortgages from one year to five years, at the same time limiting such loans to one-half the amount of the bank's savings deposits.¹¹ The amendments as a whole, liberalizing existing restrictions on the investments of national banks and erasing any possible doubt as to their power to receive savings deposits, were designed to place national banks on a better competitive footing with state banks. The House Committee on Banking and Currency, recommending the amendments, explained their purpose as follows (H. Rep. No. 83, 69th Cong., 1st Sess., p. 6; see also S. Rep. No. 473, 69th Cong., 1st Sess., p. 11):

The State banks and trust companies are authorized to make long-time loans upon the security of first mortgage upon city real estate. National banks, by being limited to a one-year period, have found themselves handicapped in meeting the demands of their customers in this respect. The section limits all such loans to an amount not exceeding one-half of the savings deposits in the bank, and thereby relates the real

¹¹ In 1935, the amount was increased to 60% of time and savings deposits or to the aggregate amount of paid-in capital and surplus, whichever is greater. Act of August 23, 1935, c. 614, 49 Stat. 706.

estate loan business to savings deposits. This is a logical connection. National banks have on deposit about \$5,000,000,000 of savings deposits from about 11,000,000 depositors. This constitutes a large proportion of the entire savings business in the United States, and it has become necessary to recognize the right of a national bank with certain definite restrictions to use these funds in the same general manner in which the State banks and trust companies are using them, which includes the right to make loans upon city property, as provided above.

The enactment of this bill into law will put new life into the national banking system. The cumulative effect of its provisions will produce a situation in the Federal reserve system where the rights of the national banks will be more nearly on a par with those of the State member banks. * * * The amendments which had heretofore been made to the national bank act were not sufficient to enable the national banks to compete on terms of equality with such State member banks, while at the same time they were compelled by law to bear the chief burden in supporting the Federal reserve system.

The objective of equalizing the competitive position of national banks with respect to other banks is not confined to Section 24 of the Federal Reserve Act, but is evidenced by other provisions of the federal banking laws. Thus, the National

Bank Act limits the power of states to tax the shares, dividends, and income of national banks to the rate assessed upon other capital in the hands of state institutions competing with national banks. R. S. 5219, as amended, 12 U. S. C. 548; *First National Bank v. Hartford*, 273 U. S. 548; *First National Bank v. Anderson*, 269 U. S. 341; cf. *Clement National Bank v. Vermont*, 231 U. S. 120, 134. The establishment and operation by national banks of new branch offices is permitted if state law confers a similar power upon state banks. 44 Stat. 1228, as amended, 12 U. S. C. 36; cf. *First National Bank v. Missouri*, 263 U. S. 640. And national banks may act as trustees, executors or administrators where state law permits competing state banks to exercise such functions. 40 Stat. 968, 12 U. S. C. 248 (k); *Burnes National Bank v. Duncan*, 265 U. S. 17; *First National Bank v. Fellows*, 244 U. S. 416.¹²

With respect to the savings deposit business, the New York statute clearly defeats this congressional end of competitive equality. As the court below observed (R. 685), the national bank employs the forbidden words "saving" and "sav-

¹² The goal of competitive equality has in some areas operated both ways. For example, endeavoring to deny national banks competitive advantages over state banks, Congress has limited the interest the former may pay on savings deposits to the maximum rates authorized by state law. 38 Stat. 273, 12 U. S. C. 371.

ings" "to bring to itself 'savings deposits' in competition with savings banks and savings and loan associations in Nassau County and elsewhere." The court thought that this competition was unwarranted and not permissible. The truth is, however, that federal law authorizes and encourages the national bank "to bring to itself 'savings deposits'" no less clearly than the State authorizes and supports such efforts by the institutions it has created. But, declares the state law, only the specified state banks may say so in the ordinary language suited to the purpose. The result, whatever its supposed basis in terms of state policy (see pp. 35-37, *infra*), places on the federal institution a competitive disability, and is therefore invalid.

4. The federal agencies charged with powers of supervision and regulation of national banks have for almost forty years taken the consistent position that state laws like the one in question here could not constitutionally apply to national banks. As long ago as 1915, the Federal Reserve Board declared that a California statute like the present New York statute, which, however, did not in terms apply to national banks, was inapplicable to such banks. The opinion read in part as follows:

Inasmuch, therefore, as Congress has the right to authorize national banks to charge interest on accounts and to include in such

accounts what are generally known as "savings accounts," and since it has exercised this right, it would seem that the California statute referred to can not properly be so construed as to defeat this right.

I can not agree with Mr. Williams that depositors would necessarily be led to assume that savings accounts received by national banks would be subject to investment according to State laws; and while national banks should not be permitted to advertise themselves as "savings banks," since they are not so designated in the act, power is specifically granted to member banks to receive interest-bearing accounts, including "savings accounts," and since they possess this power the right to advertise for such accounts would seem to be a necessary incident to its exercise.

It is not believed, therefore, that the penalties prescribed by section 49 of the bank act of the State of California could be legally enforced against a national bank which advertises that it will receive and pay interest on savings accounts. [*Federal Reserve Bulletin*, Vol. I (1915), p. 18.]¹³

Similarly, the Comptroller of the Currency has long adhered to the position that the New York

¹³ It may be noted that at the time of the quoted opinion, "savings deposits" were not in terms included in the statutes defining the powers of national banks. See pp. 17-18, *supra*. The addition of these precise words by Congress in 1927 would seem to erase any possible doubt as to the correctness of the long-standing administrative construction.

statute cannot validly be applied to national banks. In a letter dated July 15, 1927, addressed to Mr. G. Patterson Crandall, Vice President, The National Bank of Westfield, Westfield, New York, Deputy Comptroller E. W. Stearns wrote: "The banking law as recently amended empowers a national bank to receive and pay interest on savings deposits, and the right to advertise and solicit such savings accounts is necessarily incidental to the exercise of that power and cannot be interfered with or denied." Again, in 1932 and in 1938, the view was reiterated that New York could not bar national banks from using the word "savings" in their title or advertisements.¹⁴ And in a letter dated July 10, 1939, to

¹⁴ In a letter dated April 16, 1932, to Deputy Superintendent August Ihlefeldt, Jr., of the New York State Banking Department, Deputy Comptroller E. H. Gough cited the decision in *Fidelity National Bank and Trust Co. v. Enright*, 264 Fed. 236 (W. D. Mo.), which upheld the power of a national bank to use the words "trust company" in its name despite a state statute denying this power unless granted by the state. The Deputy Comptroller deemed this decision a demonstration of the right of a national bank to use the word "savings" despite the New York statute. And in a letter dated April 14, 1938, addressed to Mr. Arthur J. Geoghegan, Vice President, the Central National Bank of New Rochelle, New Rochelle, New York, Deputy Comptroller Gough advised the bank that in the opinion of the Comptroller's office any attempt on the part of the state to prohibit national banks from using the words "saving" or "savings" or their equivalent in the banking business was of no effect. A similar letter signed by Deputy Comptroller C. B. Upham was addressed to the Vice President and Cashier of the First National Bank of Glens Falls, Glens Falls, New York, on December 14, 1938.

the Attorney General for the State of New York (quoted in the appellant's Statement as to Jurisdiction, pp. 55-60), the Comptroller reaffirmed this consistent position.¹⁸

If the issue in this case were more doubtful than we think it is, this uniform administrative construction would argue weightily against the decision below. Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549; *Adams v. United States*, 319 U. S. 312, 314-315; *Edward's Lessee v. Darby*, 12 Wheat. 207, 210. We submit that the views of the Federal Reserve Board and the Comptroller of the Currency accord with the plain intent of the governing federal statutes and that the conflicting proscription of the New York statute cannot be enforced against national banks.

B. The New York statute as applied in this case cannot be sustained by the State's asserted purpose of preventing deception

The court below explains New York's statutory prohibition against use by national banks of the

¹⁸ Acting on the considered judgment that the word "savings" may be used by a national bank, the Comptroller of the Currency, whose approval is required for the name of a national bank (R. S. 5134, 12 U. S. C. 22), has approved names including this word. As long ago as October 18, 1865, the Comptroller chartered the National Savings Bank of Wheeling, Wheeling, West Virginia. And we are advised by the Comptroller's Office that there are in operation today eight national banks with the word "savings" included in their name.

words "saving" or "savings" on the ground that these are "misleading words" (R. 689) which may deceive the public into believing that banks using them "are mutual savings banks" (R. 688). It apparently approves the State Attorney General's concession (R. 688) that the State "does not claim for savings banks a monopoly on receipt of deposits of the 'savings' type." But while the court itself finds convenient the word savings, albeit in quotation marks, to describe the "type" of deposits in question, it sanctions the prohibition against such usage by national banks as a means of preventing deception.

If it were important, there would be room to question the validity of the judgment that a national bank, clearly designated as such, would be likely to be mistaken for a state-supervised "mutual savings bank" merely because it truthfully described its business of accepting "savings deposits."¹⁶ Compare the Federal Reserve Board opinion quoted *supra*, p. 32. Indeed, the decision of the court below—finding, despite the fact that appellant extensively used the word "savings," that there was "no evidence at all that [appellant] has violated * * * the other prohibition of the * * * statute, which runs against 'soliciting

¹⁶ Of interest here is the fact that banks which are not national banks are forbidden by federal law to use the word "national" in their firm names. 18 U. S. C. 709, Appendix, *infra*, p. 41.

or receiving deposits as a savings bank' ” (R. 685)—casts some doubt itself on the deception theory it espouses. While the Court of Appeals was presumably distinguishing between intentional and unintentional “deception,” it is not easy to see, if the word “savings” is the means of deception that court called it, why this alone would not support the Appellate Division’s view that appellant had solicited or received deposits “as a savings bank.”

But there is, in any event, no need to consider here whether, in the absence of paramount federal legislation, New York’s appropriation of the words “saving” and “savings” (and their equivalents) for mutual savings banks and savings and loan associations would meet some constitutional test of reasonableness. For it is clear, we think, that the two dissenting judges in the New York Court of Appeals were right in denying (R. 691) the State’s power to outlaw as “deceptive verbiage” (majority opinion, R. 688) the precise words Congress chose to describe the national bank’s authority.

If, as we have argued, Congress authorized national banks to use the apt language of the federal statute and regulations, this is the end of the matter. Once it is shown to impair the federally created power, the state restriction fails, regardless of whether it might, apart from the collision with

federal law, be sustained as a valid police measure. Cf. *Johnson v. Maryland*, 254 U. S. 51; *Ohio v. Thomas*, 173 U. S. 276; *Mayo v. United States*, 319 U. S. 441. And this conclusion, at least as it applies to the circumstances of this case, entails no disregard of the delicate problem of reconciling national and state interests. For here, as Judge Fuld wrote in dissent below (R. 690), the conflict is "patent and irreconcilable." Here, acceptance of the state statute's command calls for a concession that the familiar and appropriate language in which the federal statute and regulations describe the national bank's business becomes "a misleading description" (R. 687) when it is used by the bank for the same purpose.

To refuse such a concession is not to deny the State's power to distinguish mutual savings banks from others. It only denies that the sweeping measure the State finds appropriate to this end may be used to impair the national bank's legitimate, federally authorized functions. Narrower legislation, more precisely suited to the State's purpose and consistent with federal law, could undoubtedly be contrived. But the attempted monopolization of the common words "saving" and "savings" cannot be squared with the clear authority of national banks to use these words as Congress used them.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

1. Section 24 of the Federal Reserve Act (38 Stat. 273, as amended, 12 U. S. C. 371, reads in pertinent part as follows:

Any national banking association may make real-estate loans secured by first liens upon improved real estate, including improved farm land and improved business and residential properties. A loan secured by real estate within the meaning of this section shall be in the form of an obligation or obligations secured by mortgage, trust deed, or other such instrument upon real estate, and any national banking association may purchase any obligation so secured when the entire amount of such obligation is sold to the association. The amount of any such loan hereafter made shall not exceed 50 per centum of the appraised value of the real estate offered as security and no such loan shall be made for a longer term than five years; except that (1) any such loan may be made in an amount not to exceed 60 per centum of the appraised value of the real estate offered as security and for a term not longer than ten years if the loan is secured by an amortized mortgage, deed of trust, or other such instrument under the terms of which the installment payments are sufficient to amortize 40 per centum or more of the principal of the loan within a period of not more than ten years, and (2) the foregoing limitations and restrictions shall not prevent the renewal or extension of loans heretofore made and shall not apply to real-

estate loans which are insured under the provisions of sections 1707-1715 and 1736-1742 of this title * * *. No such association shall make such loans in an aggregate sum in excess of the amount of the capital stock of such association paid in and unimpaired plus the amount of its unimpaired surplus fund, or in excess of 60 per centum of the amount of its time and savings deposits, whichever is the greater. Any such association may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located.

2. R. S. 5136, as amended, 12 U. S. C. 24, reads in pertinent part as follows:

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling

exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter.

3. 18 U. S. C. 709 reads in pertinent part as follows:

Whoever, except as permitted by the laws of the United States, uses the words "national", "Federal", "United States", "reserve", or "Deposit Insurance" as part of the business or firm name of a person, corporation, partnership, business trust, association or other business entity engaged in the banking, loan, building and loan, brokerage, factorage, insurance, indemnity, savings or trust business; or

Whoever falsely advertises or represents, or publishes or displays any sign, symbol or advertisement reasonably calculated to convey the impression that a non-member bank, banking association, firm or partnership is a member of the Federal reserve system; or

Whoever, except as expressly authorized by Federal law, uses the words "Federal Deposit", "Federal Deposit Insurance", or "Federal Deposit Insurance Corporation" or a combination of any three of these words, as the name or a part thereof under which he or it does business, or advertises or otherwise represents falsely by any device whatsoever that his or its deposit liabilities, obligations, certificates, or shares are insured or guaranteed by the Federal Deposit Insurance Corporation, or by the United States or by any instrumentality thereof, or whoever advertises that his or its deposits, shares, or accounts are federally insured, or falsely advertises or other-

wise represents by any device whatsoever the extent to which or the manner in which the deposit liabilities of an insured bank or banks are insured by the Federal Deposit Insurance Corporation; or

* * * * *

Shall be punished as follows: a corporation, partnership, business trust, association, or other business entity, by a fine of not more than \$1,000; an officer or member thereof participating or knowingly acquiescing in such violation or any individual violating this section, by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

This section shall not make unlawful the use of any name or title which was lawful on the date of enactment of this title.

A violation of this section may be enjoined at the suit of the United States Attorney, upon complaint by any duly authorized representative of any department or agency of the United States.

4. Section 258 (1) of the New York Banking Law reads in pertinent part as follows:

No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word "saving" or "savings" or their equivalent in its banking or financial business, or use any advertisement containing the word "saving" or "savings," or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to pro-

hibit the use of the word "savings" in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued.

FILED

MAR 3 1953

HAROLD B. WILLIAMS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1953
No. 427

THE FRANKLIN NATIONAL BANK OF FRANKLIN SQUARE,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

**BRIEF OF NEW YORK STATE BANKERS
ASSOCIATION AS *AMICUS CURIAE***

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INDEX.

	PAGE
Interest of <i>Amicus Curiae</i>	1
Argument :	
I—A fundamental conflict exists between the Federal statutes governing the functions and operations of national banks and Section 258(1) of the New York Banking Law	2
II—The asserted differences between commercial banks and savings banks are in any event not sufficiently significant to justify the prohibition contained in Section 258(1) of the New York Banking Law	8
III—By granting savings and loan associations and savings banks the exclusive privilege of using the word "savings" in their dealing with the public Section 258(1) of the Banking Law has created an arbitrary and unreasonable classification between savings banks and savings and loan associations on the one hand and national banks on the other	15
IV—The Legislature of the State of New York has in effect abandoned the original objective sought to be obtained under Section 258(1) by authorizing the deposit of the savings of school children in state or national banks having an interest department	19
Conclusion ..	21

TABLE OF CASES CITED:

	PAGE
<i>Abie v. Weaver</i> , 282 U. S. 765	7
<i>Air-Way Electric Appliance Corp. v. Day</i> , 266 U. S. 71	15
<i>Davis v. Elmira Savings Bank</i> , 161 U. S. 275	3
<i>Downey v. City</i> , 106 Fed. (2) 69, aff'd 309 U. S. 590..	5
<i>Easton v. Iowa</i> , 188 U. S. 220	3, 5
<i>Fidelity National Bank & Trust Co. of Kansas City v. Enright</i> , 264 Fed. 236	4
<i>First National Bank v. California</i> , 262 U. S. 366	4, 5
<i>F. S. Royster Guano Co. v. Commonwealth of Virginia</i> , 253 U. S. 412	15
<i>Hartford Steam Boiler Inspection and Insurance Company v. Harrison</i> , 301 U. S. 459	15
<i>People v. Mechanics and Traders Savings Institution</i> (1893), 92 N. Y. 7	17, 18
<i>Springfield Inst. for Savings v. Worcester F. S. & L. Assn.</i> , 107 N. E. (2) 315, cert. denied 344 U. S. 884	5

STATUTES AND REGULATIONS:

Federal Reserve Act, Section 24, as amended (38 Stat. 273, 12 USC § 371)	3, 4, 5
Laws of 1858, Chapter 132, Section 1	15, 16
Laws of 1875, Chapter 371 (General Savings Bank Law)	8, 9
Laws of 1878, Chapter 374	9
Laws of 1904, Chapter 568	19, 20

	PAGE
Laws of 1905, Chapter 564	16
Laws of 1909, Chapter 497, Sec. 160	20
Laws of 1914:	
Chapter 369	10
Chapter 369, Section 279	16
Laws of 1920, Chapter 167	9
Laws of 1923, Chapter 669	12
Laws of 1925, Chapter 278	9
Laws of 1926, Chapter 631	12
Laws of 1934:	
Chapter 255	13
Chapter 503	13
Laws of 1936, Chapter 805	13
Laws of 1937:	
Chapter 463	12
Chapter 686	10
Laws of 1938, Chapter 352, Section 1	10, 13
Laws of 1939, Chapter 882, Article 1X-D	12
Laws of 1940, Chapter 449, Section 3	13
Laws of 1942, Chapter 434	13
Laws of 1945:	
Chapter 298	10
Chapter 319	13
Laws of 1946:	
Chapter 184	11
Chapter 185	11
Chapter 507	11
Chapter 560	14
Chapter 788	10
Laws of 1948, Chapter 296	13

	PAGE
Laws of 1949:	
Chapter 522	11
Chapter 545	11
Chapter 692	12
Laws of 1951, Chapter 592	9
Laws of 1952:	
Chapter 546	20
Chapter 705	11
National Bank Act, Section 24(7), as amended (R. S. 5136, 12 USC § 24(7))	3, 11
New York Banking Law:	
Section 234(9)	12
Section 237(1)b	9
Section 258	15, 19, 20
Section 258(1)	2, 5, 6, 8, 14, 15, 16, 19, 20, 21
Section 258(2)	20
Section 258(5)	11
Section 378	18
Rules and Regulations of the Federal Savings and Loan Association, (Chapter 1(c), Title 24, Code of Federal Regulations	18
Rules of the Supreme Court of the United States, Rule 27.9(a)	1
44 Stat. 1232	16
12 U S C Sec. 1464(b)	18

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**BRIEF OF NEW YORK STATE BANKERS
ASSOCIATION AS *AMICUS CURIAE***

This brief is submitted by the New York State Bankers Association as *amicus curiae* with the written consent of all parties to the case pursuant to Rule 27.9(a) of the Rules of this Court.

Interest of *Amicus Curiae*

The New York State Bankers Association is composed of more than 650 banks and trust companies located throughout New York State. Included are 369 national banks. One of the principal functions of the Association is to promote in the public interest sound banking practices. It has been stipulated by the parties to this case that savings deposits (desig-

nated in the stipulation as time deposits) in national banks in New York State represent a substantial percentage of all deposits in such banks. Thus in 1949 a total of 388 national banks in New York State had \$10,332,772,000 in demand deposits and \$1,812,125,000 in time deposits (R. 652). The percentage of time deposits to demand deposits is substantially higher outside the City of New York. Specifically, in Nassau County, where appellant's bank is located, national banks in 1949 had total demand deposits of \$152,981,000 and time deposits of \$124,798,000.

The judgment and decision of the New York Court of Appeals, therefore, affects not only the appellant but all national banks located in New York with respect to a most important if not, indeed, vital phase of their business.

A R G U M E N T

I

A fundamental conflict exists between the Federal statutes governing the functions and operations of national banks and Section 258(1) of the New York Banking Law.

The judgment from which this appeal is taken enjoins appellant, a national bank, from advertising or otherwise using the word "saving" or "savings" in relation to its banking or financial business in its dealings with the public (R. 694). The judgment is grounded on Section 258(1) of the New York Banking Law which prohibits the use, except by a savings

bank or a savings and loan association, of the word "saving" or "savings" or their equivalent in the advertising and conduct of banking or financial business.

Section 24 of the Federal Reserve Act, as amended (38 Stat. 273, 12 USC § 371), expressly authorized national banks "to receive time and savings deposits" and Section 24(7) of the National Bank Act, as amended (R. S. 5136, 12 USC § 24(7)) confers upon national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking."

The express statutory authority to receive savings deposits when read in conjunction with the incidental powers conferred by Section 24(7) of the National Bank Act compels the conclusion that national banks are not only authorized to accept savings deposits, but are empowered to do all things appropriate and necessary in order to obtain such deposits, including bringing home to the public that this type of banking service is available to them in national banks.

The appellant's brief clearly demonstrates that both the legislative history and administrative interpretations of the Federal statute point irresistibly to the same conclusion. Granting that this is so, the attempt by the State of New York to enjoin appellant from exercising the powers thus conferred is in direct conflict with the purpose of Congress and paramount Federal laws. It is firmly established that under such circumstances the state statute must yield.

Davis v. Elmira Savings Bank, 161 U. S. 275;
Easton v. Iowa, 188 U. S. 220;

First National Bank v. California, 262 U. S. 366;

Fidelity National Bank & Trust Co. of Kansas City v. Enright, 264 Fed. 236.

The majority of the Court of Appeals purport to recognize this principle, but argue that it is not applicable here because no conflict in fact exists. The Court found merely "a superficial, or seeming, contradiction between the phrasing of the two enactments" (R. 687). It disavowed any intention to "prevent defendant from carrying on a particular kind of banking business" (R. 687) and stated that it did not claim for savings banks a monopoly on the receipts of deposits of the "'savings' type" (R. 688). It justified the restriction upon the use of the word "savings" by other than savings banks and savings and loan associations with the claim that the use of the word by a national bank would constitute a misleading description of its business. Other phrases such as "deception of our people" (R. 687), "deceptive verbiage" (R. 688), "fairness in business transactions" (R. 687), "misleading words" (R. 689), are scattered throughout the opinion.

In the final analysis, however, the Court's attack is not upon the action of the appellant, but upon the Congressional intent. It is Congress which used the words "savings deposits" no less than three times in the statute. It is completely unrealistic for the Court of Appeals to assert that Congress did not intend that national banks should use the identical words found in the statute when advising the public of the banking function it is prepared to furnish. The Court might as well have said that anyone who reads Section 24

of the Federal Reserve Act is in danger of being misled into believing that a national bank is similar to a savings bank.

General Congressional acts are to be interpreted in the light of the policy therein expressed and not upon the statutes of the particular states.

Downey v. City, 106 Fed. (2) 69, 73, aff'd 309 U. S. 590;
First National Bank v. California, 262 U. S. 366; 369, 370, *supra*;
Springfield Inst. for Savings v. Worcester F. S. & L. Assn., 107 N. E. (2) 315, cert. denied 344 U. S. 884.

The Court of Appeals, in violation of this principle, disregarded the Congressional policy expressed in the Federal statutes and upheld Section 258(1) on its construction of the intention of New York State Legislature. This approach destroys the independence and uniformity of the powers and purposes of national banks which the Federal laws were intended to secure.

Easton v. Iowa, 188 U. S. 220, 229, *supra*.

Nor is the existence of a conflict between Federal and state enactments avoided by the claimed salutary motives behind the state statute.

Easton v. Iowa, 188 U. S. 220, 238, *supra*.

While the Court of Appeals may disavow any desire to create a monopoly for savings banks and savings and loan associations in deposits of the "savings" type there is no question that New York has

attempted to create such a monopoly with respect to the very word used by Congress in describing the permissible functions of a national bank.

It is no answer to suggest, as does the Court of Appeals, that national banks in New York, other than the appellant's, have found it possible to receive savings deposits by the use in their advertising of expressions which the Court characterizes as "synonymous," such as "special interest account," "thrift account," and "compound interest account". If these expressions are actually synonymous with the word "savings" then it is difficult to perceive how harm can result from the use by national banks of the word "savings." Since Section 258(1) of the New York Banking Law applies not only to the use of the word "savings" but to its "equivalent," it would seem that the state recognizes that the statute cannot be validly applied as written. Otherwise, the synonymous expressions would come within the ban of being equivalent.*

The only true explanation, therefore, of the Court's reasoning is that, despite its statement to the contrary, it did not regard the expressions as synonymous. The whole import of its decision is that the word "savings" had certain connotations which the so-called "synonymous expressions" did not contain. This rationale emphasizes the conflict between the enactments. National banks are in effect required to use different words having different meanings than the term used by Congress in authorizing the function. Congress having authorized national banks to accept savings deposits, the New York statute in

* Mr. Seaton, a State Bank Examiner, testified that these expressions are the "equivalent" of "savings" (R. 63).

effect would require them to advise the public differently.

The Court of Appeals further observes that national banks operating in New York, other than appellant, have not used the word "saving" or "savings." While there is at least one example in the record which contradicts this statement (R. 583), the more important criticism is that a state statute which otherwise conflicts with paramount Federal law is not validated by compliance therewith by national banks operating in the state. National banks by such compliance are not estopped from asserting that the state enactment is unconstitutional, nor does their conduct constitute a waiver of their rights so to do. Cf. *Abie v. Weaver*, 282 U. S. 765, 775-776.

In directing the Court's attention to the conflict between the Federal and state legislation it is not intended to overlook the discrimination against national banks implicit in the state statute and the competitive advantage thereby created in favor of savings banks and savings and loan associations over national banks who compete for the same type of deposit. In addition to the argument in the appellant's brief on these points the Court's attention is respectfully directed to the following considerations.

II

The asserted differences between commercial banks and savings banks are in any event not sufficiently significant to justify the prohibition contained in Section 258(1) of the New York Banking Law.

There appears to be no dispute with respect to the competition between commercial banks, both national and state, and savings banks and savings and loan associations for the "savings type" deposit.

While it is true that savings banks in New York State have continued to be mutual institutions, nevertheless, they have long since departed from their original philanthropic concept (R. 284-285). Growth in size has been accompanied by expansion in functions. Their development has been particularly marked during the past 20 years. Their growth measured by deposits in New York State was in excess of 26% in the five years ended 1950 (R. 651).

The differences that may once have existed between commercial banks and savings banks have tended to disappear as a result of favorable legislation in New York which has gradually enlarged the activities of savings banks and permitted them to encroach further and further into the commercial field of banking.

Savings banks were originally restricted in the scope of their banking and investment powers. When the General Savings Bank Law was adopted as Chapter 371 of the Laws of 1875, all existing mutual sav-

ings banks became subject to its provisions and were brought under the supervision of the Superintendent of Banks. Investments authorized to be made were limited to (1) obligations of the United States and of the State of New York, and with reservations, to those of other states and of cities, counties, towns and villages of New York, and (2) mortgages on real estate situate in New York worth twice the amount loaned thereon, but in no event to exceed 60% of the whole amount of deposits so invested.

Over the years, the Legislature has gradually expanded the powers of mutual savings banks and thereby narrowed the differences which once existed between them and commercial banks.

A brief review of legislation during the last twenty years only will document this contention:

(1) *Amount of deposits received from any one individual*: The General Law adopted in 1875 did not set any limit on the amount of deposits which could be received and the charters of the various mutual savings banks varied in this respect. In 1878, the Legislature restricted the amount which could be deposited by any one person to \$3,000 (Laws of 1878, Chapter 374). This limitation was subsequently increased to \$5,000 (Laws of 1920, Chapter 167); to \$7,500 (Laws of 1925, Chapter 278); and to \$10,000 (Laws of 1951, Chapter 592). It is significant that subdivision 1(b) of Section 237 of the Banking Law provides that in computing the amount of such deposit of an individual there may be excluded all amounts credited to him as a trustee up to a maximum of \$10,000. Presumably he could also be a beneficiary of a trust to the extent of \$10,000 and thus

with his individual account have an aggregate of \$30,000 on deposit in one savings bank.

(2) *Branch offices*: Chapter 369 of the Laws of 1914 had restricted a mutual savings bank to one office except for a branch acquired as a result of merger with another mutual savings bank. This restriction was lifted in 1938. In that year, it was provided that, where the principal office of a mutual savings bank was located in a city in excess of 250,000 people, such bank might have one branch within the city (Laws of 1938, Chapter 352, Section 1). In 1945, authorization was given to a mutual savings bank located in a city having a population of more than one million to maintain three branch offices in such city (Laws of 1945, Chapter 298). In 1946 branch banking was further extended by authorization to a mutual savings bank located in a city having a population of more than 30,000 and not more than 250,000 to maintain one branch office in such city, and to a bank in a city having a population of more than 250,000 and not more than one million, to maintain two branch offices, in such city (Laws of 1946, Chapter 788).

(3) *Broadened investment powers*: In the area of authorized investments, the mutual savings banks have demanded and received a continuous succession of permissive legislation to open new channels for use of their vast deposits. These permissive legislative enactments favoring mutual savings banks have been far too numerous to enumerate. Chief among these have been:

1937—Permission to invest in Canadian securities (Laws of 1937, Chapter 686).

1946—Permission to invest in obligations of the International Bank for Reconstruction and Development (Laws of 1946, Chapter 507). Permission to make loans for the modernization and rehabilitation of real estate (Laws of 1946, Chapter 185).

1949—Permission to invest in corporate interest bearing securities not otherwise eligible for investment (Laws of 1949, Chapter 522). Permission to invest in FHA mortgages secured by property located anywhere in the United States (Laws of 1949, Chapter 545).

1952—Permission to invest in the preferred and common stocks of corporation (Laws of 1952, Chapter 705).

National banks have no power to invest in common or preferred stock and in this respect savings banks have broader and less conservative investment powers (Sec 24(7) of National Bank Act, as amended (12 U S C § 24(7))).

(4) *Transmission of funds:* The general powers of mutual savings banks were extended in 1946 so as to permit them to perform a function normally carried on by commercial banks, and other specialized institutions. A mutual savings bank may now receive money for transmission through any bank or through any other corporation having power to so transmit moneys (Laws of 1946, Chapter 184).

(5) *Payroll savings deposits:* Section 258 of the Banking Law was amended by adding a subdivision 5 authorizing acceptance of deposits from an employer

or employee group to be credited to the individual accounts of the group (Laws of 1937, Chapter 463). In order to make this type plan of deposits workable from the standpoint of the employer, who is charged with supervision over the deposits, no passbook is now required in connection with the deposits (Laws of 1949, Chapter 692). Mutual savings banks have thus been empowered to tap a new source of deposit by relaxing the usual safeguards that are inherent in the use of a passbook.

(6) *Safe deposit boxes:* Laws of 1923, Chapter 669, provided that savings banks should have the power to rent boxes for storage of securities and valuable papers only, "in cities of first class." In 1926, this section was amended so as to include all savings banks (Laws of 1926, Chapter 631). The limitation previously imposed upon mutual savings banks to accept only securities and valuable papers in safe deposit boxes controlled by them was extended to include jewelry (Section 234(9) of the Banking Law). The difficulty in supervising the character of property placed by customers in safe deposit boxes is apparent.

(7) *Establishment of authorization to issue life insurance policies:* In 1939, the Legislature granted the authority to savings banks to establish insurance departments and to issue life insurance policies in an amount not in excess of \$1,000 (Laws of 1939, Chapter 882, Article IX-D). Allegedly, this bill was for the purpose of providing direct control between the insurer and the policyholder without the intervention of an agent or broker. In 1942, the above section was amended to extend the maximum sum allowable on

individual policies from \$1,000 to \$3,000 (Laws of 1942, Chapter 434). This amount was again increased in 1948 to \$5,000 (Laws of 1948, Chapter 296).

(8) *Further legislation:* A list of other permissive legislation in the savings bank field includes:

1934—Granted right to assume and discharge obligations to Federal Deposit Insurance Corp. as required for deposit insurance. (Laws of 1934, Chapter 503).

Granted right to become member of Federal Reserve Bank (Laws of 1934, Chapter 503). Authorized creation of Savings Bank Trust Company (Laws of 1934, Chapter 255).

1936—Permitted to make F. H. A. insured loans (Laws of 1936, Chapter 805).

1938—Granted power to act as agent in sale of travelers' checks (Laws of 1938, Chapter 352, Section 1).

1940—Permitted to invest in certificates of investment in savings banks life insurance fund, and in certificates of contribution to the surplus fund of its life insurance department (Laws of 1940, Chapter 449, Section 3).

1945—Permitted to invest in obligations of any corporation organized under any law of this state for the purpose of dealing in housing projects (Laws of 1945, Chapter 319).

1946—Right to invest in mortgages extended to permit investments in property upon which improvements were under construction for business, manufacturing, agricultural, or residential purposes (Laws of 1946, Chapter 560).

It is apparent from the foregoing that the original concept of a savings bank as a mutual organization, the fundamental purpose of which was the protection of small deposits, has gradually tended to disappear. Savings banks now perform many of the functions of commercial banks. They have grown in size in the State of New York to a point where in 1950 their aggregate deposits were \$11,102,297,000 (R. 651). They actively compete with national banks for the same type of savings deposits (R. 155, 411).

While expanding the powers of savings banks and permitting them to encroach more and more in the field of commercial banks the state, nevertheless, has continued to permit savings banks and savings and loan associations to monopolize the word "savings". With the passage of time, therefore, the prohibitions contained in Section 258(1) of the Banking Law have more and more tended to assume the form of an artificial and unreasonable barrier which is not only unconstitutional in its operation but preventive of the free and healthy growth of national banking service to the community.

III

By granting savings and loan associations and savings banks the exclusive privilege of using the word "savings" in their dealing with the public Section 258(1) of the Banking Law has created an arbitrary and unreasonable classification between savings banks and savings and loan associations on the one hand and national banks on the other.

The general rule in determining whether or not there has been a proper classification for purposes of exercising police power by a state is that the classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U. S. 459;
F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U. S. 412, 415;
Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 85.

The forerunner of Section 258 of the New York Banking Law here in issue, was enacted originally in 1858. Chapter 132, Section 1, read as follows:

"It shall not be lawful for any bank, banking association or individual banker, authorized to issue circulating notes, by the laws of this state, established in any city or village where a chartered savings bank is located to advertise or

put forth a sign as a savings bank, and any bank, banking association or individual banker, which shall offend against these provisions shall forfeit and pay for every such offense the sum of one hundred dollars for every day such offense shall be continued, to be sued for and recovered in the name of The People of the State, by the district attorneys of the several counties in any court having cognizance thereof, for the use of the poor, chargeable to said county in which such offense shall be committed."

The provision continued substantially the same until 1905 when by Chapter 564, Laws of 1905, the Section was amended to specifically prohibit the use of the word "savings". *Contemporaneously building and loan associations were included for the first time within the privileged class of those permitted to use the forbidden word.* Thus, after a period of forty-seven years during which mutual savings banks alone were allowed to hold themselves out as "savings" banks, savings and loan associations were given a similar privilege.

In 1914, national banks were specifically added to the list of banking institutions barred from either holding themselves out as savings banks or using the word "savings" in their dealings with the public (Chapter 369, Section 279, Laws of 1914). It is unnecessary to determine whether Section 258(1) of the Banking Law as amended in 1914 was in conflict with the authority conferred upon national banks at that time to receive time deposits. It was not until 1927 that the words "savings deposits" were expressly included in the authorizing Federal statute (44 Stat. 1232).

While the majority of the Court of Appeals states that the character and purposes of savings and loan associations are under New York laws so similar to those of savings banks as to call for the same kind of protection it is appropriate to note that the word "savings" when applied to a savings and loan association has quite a different connotation than when applied to a savings bank. It is only necessary to observe the fundamental differences in the relationship between the savings bank and its depositors and the savings and loan association and its shareholders to realize that the meaning of the word "savings" as used in the statute is not the narrow one which the court below attributed to the Legislature.

The relationship between a mutual savings bank and its depositors is that of creditor and debtor. *People v. Mechanics and Traders Savings Institution* (1893), 92 N. Y. 7. In that case this Court said:

"The primary relation of a depositor in a savings bank, to the corporation, is that of creditor and not that of a beneficiary of a trust. The deposit when made becomes the property of the corporation. The depositor is a creditor for the amount of the deposit, which the corporation becomes liable to pay according to the terms of the contract under which it is made. When payment is made, the claim of the depositor is extinguished and he has no further claim upon the funds or assets of the bank. Upon insolvency the assets and property of the corporation, as in the case of other corporations, is a trust fund for the payment of creditors, and depositors we think stand as other creditors having no greater, but equal rights to be paid ratably out of the insolv-

ent estate. The fact that savings banks are public agencies created by law to receive and invest the money deposited in them does not change the status of the depositors, upon insolvency of the bank, from that of creditors to that of beneficiaries of a trust, so as to subject the assets of the bank to the payment in the first instance of other creditors."

The relationship between a savings and loan association and its shareholders, however, is that of a corporation and its stockholders. This is true whether the savings and loan association is state or federally chartered. (See: New York Banking Law, Section 378; 12 USC Sec. 1464(b)). The differences in legal relationship are significant. A savings and loan association does not receive deposits, it merely sells shares. Its "capital" consists of its "savings accounts". The so-called "depositors" never become creditors but only shareholders, and, as such, never can sue for payment as a creditor. The holders of "savings accounts" may vote on corporate matters, having one vote for each \$100 of withdrawal value of their respective "accounts". The method of payment is regulated by statute so that there is no absolute right to payment as there is in the case of the savings deposits received by national banks and savings banks. (Rules and Regulations of the Federal Savings and Loan Association, Chapter I(C), Title 24, Code of Federal Regulations).

In contrast to savings and loan associations the account in a national bank which is authorized "to receive time and savings deposits and to pay interest on the same" is substantially similar to an account in a savings bank. Like the savings bank, the relation

between the bank and its depositors is that of creditor and debtor.

We submit, therefore, that once having opened the door to the use of the word "savings" and the solicitation of "savings accounts" by savings and loan associations, the Legislature, in effect, removed whatever basis may have previously existed for restricting the word to a particular type of banking operation. The classification made in Section 258(1) ceased to have any objective validity at that time. The wide and substantial difference between savings accounts in savings banks and national banks on the one hand and in savings and loan associations on the other destroys any basis for claiming that the word "savings" has a peculiar or limited meaning appropriate only to savings banks.

IV

The Legislature of the State of New York has in effect abandoned the original objective sought to be obtained under Section 258(1) by authorizing the deposit of the savings of school children in state or national banks having an interest department.

As has been seen, the Court of Appeals has placed its entire justification for Section 258(1) of the Banking Law on the purpose of preventing a deception from being practiced upon the public.

In 1904 a provision was added to Section 258 of the Banking Law permitting the principal or superintendent of the school to accept deposits of children to be placed in savings banks only (Chapter 568, Laws

of 1904). This provision was later enlarged to cover situations where there was no regularly established office of a savings bank in a town or city where the school was located. Under such conditions the money might "not later than the day following the collection (a) be deposited in any trust company or state or national bank located in the state and having an interest department, or (b) be used for the purchase of shares in any savings and loan association located in the state * * *".

It was further provided that even if a savings institution should be opened in that city or town, savings already deposited in institutions other than savings banks might continue to remain there (Laws of 1909, Chapter 497, Sec. 160).

This provision existed as Sub-section 2 of Section 258 of the New York Banking Law up to 1952.

In 1952 the New York Legislature finally placed all banks, whether savings or commercial, on precisely the same footing with respect to the receipt of savings collected from school children.

By Chapter 546, Laws of 1952, money collected from school children could "be deposited in some savings bank in the state to be used for purchase of shares in any savings and loan association organized under this law or under the laws of the United States, whose principal office is located in the State of New York, *or be deposited in any trust company or state or national bank located in the state and having an interest department.*" (Italics supplied.)

The classification contained in Section 258(1) has, therefore, been completely abandoned for children

making deposits through school savings programs. It is difficult to conceive how any distinction between savings accounts in national banks and savings accounts in savings banks can any longer have any reasonable validity. In the case of deposits of the funds of school children, not only is the depositor divorced from choosing a depository, his savings may be placed in any banking institution without his knowledge. It is clear that the basis for the original enactment of Section 258(1) no longer exists in fact or law.

CONCLUSION.

A direct conflict exists between Section 258(1) of the New York Banking Law and the paramount laws of the United States which authorize national banks to receive savings deposits. Section 258(1) also discriminates against national banks and impedes their ability to compete with state banking institutions. National banks are thereby rendered less effective in providing the banking and financial services for which they were designed. All national banks in the State of New York are affected. The judgment appealed from should, therefore, be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 427.—OCTOBER TERM, 1953.

The Franklin National Bank of Franklin Square, Appellant, v. The People of the State of New York.	}	On Appeal From the Court of Appeals of the State of New York.
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[April 5, 1954.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

This appeal from the Court of Appeals of New York presents the narrow question whether federal statutes which authorize national banks to receive savings deposits conflict with New York legislation which prohibits them from using the word "saving" or "savings" in their advertising or business. We think the federal and state statutes are incompatible, and in such circumstances the policy of the State must yield.

It is the policy of New York to charter and foster the mutual savings bank, a nonprofit institution whose earnings inure to the benefit of depositors rather than to stockholders. These institutions have a long history as relatively stable and safe depositories for the accumulations of thrifty New Yorkers and as a source of credit for limited uses. They have grown to be an important part of New York's banking and economic structure. That State also charters the savings and loan association, an institution of a different type, intended to serve somewhat similar ends. The Legislature was concerned lest commercial banks, in seeking to induce deposits of the same character, so use the word "savings" as to lead uninformed and indiscriminating persons to believe that

2 FRANKLIN NATIONAL BANK v. NEW YORK.

they were dealing with the chartered savings institutions. Hence, by its Banking Law, New York has forbidden use of the word "savings," or its variants, by any banks other than its own chartered savings banks and savings and loan associations.¹

However, the Federal Government is a rival chartering authority for banks. Since *McCulloch v. Maryland*, 4 Wheat. 316, it has not been open to question that the Federal Government may constitutionally create and govern such institutions within the states. The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories. Some of their functions, especially as a source for federal credit, depend upon their success in attracting private deposits. That these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority. Of such nature are the measures now before us.

¹ McKinney's N. Y. Laws, Banking Law, § 258 (1), reads: "No bank, trust company, national bank, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or their equivalent in its banking or financial business, or use any advertisement containing the word 'saving' or 'savings,' or their equivalent in relation to its banking or financial business, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank; but nothing herein shall be construed to prohibit the use of the word 'savings' in the name of the Savings and Loan Bank of the State of New York or in the name of a trust company all of the stock of which is owned by not less than twenty savings banks. Any bank, trust company, national bank, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

The Federal Reserve Act provides that a national bank "may continue hereafter as heretofore to receive time and savings deposits and to pay interest on the same, but the rate of interest which such association may pay upon such time deposits or upon savings or other deposits shall not exceed the maximum rate authorized by law to be paid upon such deposits by State banks or trust companies organized under the laws of the State in which such association is located."² The Act authorizes the Federal Reserve Board of Governors to make necessary rules and regulations,³ which the Board has done by defining such terms as "time deposits" and "savings deposits."⁴ The National Bank Act authorizes national banks to receive deposits without qualification or limitation, and it provides that they shall possess "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter."⁵

Appellant, believing it was authorized by the Federal Government to do so, used the word "saving" and "savings" in advertising, in signs displayed in the bank, on its deposit and withdrawal slips, and in its annual reports. It is beyond question that appellant violated the State's prohibition if it is a valid one.

The Attorney General of the State initiated this case by a complaint alleging such violations, seeking a broad

² 38 Stat. 273, 44 Stat. 1232, as amended, 12 U. S. C. (1952 ed.) § 371.

³ 38 Stat. 262, 12 U. S. C. (1952 ed.) § 248 (i). See also 49 Stat. 714, 12 U. S. C. (1952 ed.) § 461.

⁴ 12 CFR §§ 204.1, 217.1.

⁵ R. S. § 5136, 12 U. S. C. (1952 ed.) § 24 (seventh).

4 FRANKLIN NATIONAL BANK v. NEW YORK.

injunction. The trial accumulated a large record devoted mainly to the merits and demerits of the New York legislation and its consequences upon banks and depositors. The trial court found no purposeful deception of the public. It held that the advertising and other use of the forbidden terms were in pursuit of implied and incidental powers conferred upon national banks by the Acts of Congress and that the New York statute in conflict with them must yield. The Appellate Division disagreed and directed a permanent injunction prohibiting the use of the term. The Court of Appeals affirmed, and we noted probable jurisdiction of an appeal.⁶

We are unable to support the contention that the authorization for national banks to receive savings deposits is limited or qualified because of the expression that they may "continue hereafter as heretofore" to do so. It appears that previous to the enactment, acceptance of such accounts by national banks had been usual but was not expressly authorized. We do not think the Federal Reserve Act should be construed to freeze individual banks or those located within any state to the customs and practices preceding the statute. We read the Act as declaratory of the right of a national bank to enter into or remain in that type of business. That has been the administrative construction, and we think it is correct.

Nor can we construe the two Federal Acts as permitting only a passive acceptance of deposits thrust upon them. Modern competition for business finds advertising one of the most usual and useful of weapons. We cannot

⁶ 200 Misc. 557, 105 N. Y. S. 2d 81, rev'd, 281 App. Div. 757, 118 N. Y. S. 2d 210, aff'd, 305 N. Y. 453, 113 N. E. 2d 796, probable jurisdiction noted, 346 U. S. 908. Appellee included in its complaint a charge that appellant solicited business as a savings bank. However, the New York Court of Appeals held that there was no evidence of such practice. Therefore, the sole question before this Court relates to appellant's use of the prohibited words in advertising ~~its deposits and accounts.~~ *or business.*

believe that the incidental powers granted to national banks should be construed so narrowly as to preclude the use of advertising in any branch of their authorized business. It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.

Appellee does not object to national banks taking savings deposits or even to their advertising that fact so long as they do not use the word "savings." It takes the position that this word is a misnomer in New York because depositors there, as a result of the State statute, have come to think of savings accounts as something entirely different from those to which the Federal Act is referring. Regardless of whether New Yorkers are really misled by the description, the fact is that Congress has given a particular label to this type of account. Whatever peculiar meaning the word may have in New York, it is a word which aptly describes, in a national sense, the type of business carried on by these national banks. They do accept and pay interest on time deposits of people's savings, and they must be deemed to have the right to advertise that fact by using the commonly understood description which Congress has specifically selected. We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances.⁷

⁷ *E. g.*, R. S. § 5155, 12 U. S. C. (1952 ed.) § 36 (c) (establishment of branch banks); R. S. § 5136, 12 U. S. C. (1952 ed.) § 24 (eighth) (contributions to charitable instrumentalities); R. S. § 5153, 12 U. S. C. (1952 ed.) § 90 (security for the deposit of state funds); R. S. § 5197, 12 U. S. C. (1952 ed.) § 85, and part of the section involved in this case, 38 Stat. 273, 44 Stat. 1232, as amended, 12 U. S. C. (1952 ed.) § 371 (interest rates). Even in the absence of such express language, national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law. Cf. *Anderson National Bank v. Lockett*, 321 U. S. 233; *McClellan v. Chipman*, 164 U. S. 347.

6 FRANKLIN NATIONAL BANK *v.* NEW YORK.

There appears to be a clear conflict between the law of New York and the law of the Federal Government. We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy.⁸ However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy.

The judgment of the New York Court of Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

⁸ *Easton v. Iowa*, 188 U. S. 220, 229-230; *Davis v. Elmira Savings Bank*, 161 U. S. 275, 283.

SUPREME COURT OF THE UNITED STATES

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[April 5, 1954.]

MR. JUSTICE REED, dissenting.

I dissent. It should be noted that the New York statute, note 1 of the Court's opinion, limits the use of the words "saving" or "savings" in relation to their banking business to certain types of New York financial institutions. These are those that are mutual in character as distinguished from stockholder-owned. Such mutual institutions can and do pay larger returns on deposits in New York than the commercial stock-type banks, state or national, both of which are barred by the New York statute from using the word "savings" "in relation to banking or financial business." The mutual banks have been successful in attracting a large proportion of savings deposits for over a century. They have a remarkable record for soundness in finance and profitable operation for the benefit of the depositors. The purpose of the New York law is to reserve the use of the word "savings" to identify the mutual type of bank operation for the public, just as the federal banking laws reserve the name "national" for a certain type of bank organized under federal law.

The Court's opinion permits the national banks to trade upon the good name of the savings banks to secure deposits of that type. Now they may advertise "A Savings

2 FRANKLIN NATIONAL BANK *v.* NEW YORK.

Bank" under their corporate name; their deposit slips may say "Savings Account." As no federal statute expressly authorizes the national banks to use the words "saving" or "savings" in their advertisements, I think they must conform to the New York law for the protection of the public from misunderstanding. I would not imply a federal privilege to use "savings" in advertising from the fact that national banks may accept savings deposits. The cases cited by the Court in note 7 sustain that view. I know of no precedents that approve such a limitation on state power as the Court now announces.

